S. HRG. 106–112

INTERNET GAMING

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 692

HOW THE PROVISIONS OF THE INTERNET GAMING PROHIBITION ACT WILL IMPACT TRIBAL GAMING ACTIVITIES CONDUCTED UNDER THE INDIAN GAMING REGULATORY ACT

JUNE 9, 1999
WASHINGTON, DC

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INTERNET GAMING

WEDNESDAY, JUNE 9, 1999

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Inouye, and Reid.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The committee will come to order.

This morning the committee will consider legislation to prohibit most forms of gambling now conducted on the Internet and how that legislation will impact tribal gaming activities conducted under the Indian Gaming Regulatory Act.

It should be acknowledged up front that there are certain forms of gambling that will not be impacted by the bill, and, in fact, have been granted exceptions under S. 692. These include State lotteries, horse racing and so-called fantasy sports leagues.

The bill will have impact on Indian gaming—that's clear. On the heels of the 1987 Supreme Court decision in *Cabazon Band of Mission Indians* v. *the State of California* this committee began consideration of what was to become the Indian Gaming Regulatory Act of 1988. The committee had the foresight to realize that gaming conducted by Indian tribes should benefit from advances in technology. For instance, the committee envisioned that distinct tribes on various reservations could link players electronically by cable, telephone or satellite, and, thereby, increase the attractiveness of the games. Many tribes are now doing precisely that and are threatened by the provisions of the Internet Gaming Prohibition Act.

There are other potential impacts that we will also explore today, and we are pleased to see that this bill had been modified in certain key respects—one of them being jurisdiction and authority over violations of the proposed Act alleged to occur on Indian land. In particular, I am interested in hearing from the Department of Justice and the National Indian Gaming Commission about regulatory issues and the effectiveness of the proposed legislation framework under S. 692.

[Text of S. 692 follows:]

II

Calendar No. 158

106TH CONGRESS
1ST SESSION

S. 692

To prohibit Internet gambling, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 23, 1999

Mr. KYL (for himself, Mr. BRYAN, Mr. GRASSLEY, Mrs. FEINSTEIN, Mr. GORTON, Mr. ENZI, Mr. NICKLES, Mr. THURMOND, Mr. MACK, Mr. COVERDELL, Mr. SANTORUM, Mr. REID, Mr. SMITH of New Hampshire, Mr. HUTCHINSON, Mr. ALLARD, Mr. BOND, Mr. LOTT, Mr. JOHNSON, Mr. VOINOVICH, Mr. DEWINE, Mr. BROWNBACK, Mr. BUNNING, and Mr. TORRICELLI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JUNE 17, 1999

Reported by Mr. HATCH, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To prohibit Internet gambling, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~SECTION 1. SHORT TITLE.~~

~~This Act may be cited as the "Internet Gambling Prohibition Act of 1999".~~

SEC. 2. PROHIBITION ON INTERNET GAMBLING.

(a) IN GENERAL.—Chapter 50 of title 18, United States Code, is amended by adding at the end the following:

"§ 1085. Internet gambling

"(a) DEFINITIONS.—In this section:

"(1) BETS OR WAGERS.—The term 'bets or wagers'—

"(A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game of chance, upon an agreement or understanding that the person or another person will receive something of value based on that outcome;

"(B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

"(C) includes any scheme of a type described in section 3702 of title 28, United States Code; and

"(D) does not include—

"(i) a bona fide business transaction governed by the securities laws (as that term is defined in section 3(a)(47) of the

~~Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))) for the purchase or sale at a future date of securities (as that term is defined in section 3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(10)));~~

~~"(ii) a transaction on or subject to the rules of a contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7);~~

~~"(iii) a contract of indemnity or guarantee; or~~

~~"(iv) a contract for life, health, or accident insurance.~~

~~"(2) CLOSED-LOOP SUBSCRIBER-BASED SERVICE.—The term 'closed-loop subscriber-based service' means any information service or system that uses—~~

~~"(A) a device or combination of devices—~~

~~"(i) expressly authorized and operated in accordance with the laws of a State, exclusively for placing, receiving, or otherwise making a bet or wager described in subsection (d)(1)(B); and~~

~~"(ii) by which a person located within any State must subscribe to be authorized~~

~~to place, receive, or otherwise make a bet or wager, and must be physically located within that State in order to be authorized to do so;~~

~~"(B) an effective customer verification and age verification system, expressly authorized and operated in accordance with the laws of the State in which it is located, to ensure that all applicable Federal and State legal and regulatory requirements for lawful gambling are met; and~~

~~"(C) appropriate data security standards to prevent unauthorized access by any person who has not subscribed or who is a minor.~~

~~"(3) FOREIGN JURISDICTION.—The term 'foreign jurisdiction' means a jurisdiction of a foreign country or political subdivision thereof.~~

~~"(4) GAMBLING BUSINESS.—The term 'gambling business' means a business that is conducted at a gambling establishment, or that—~~

~~"(A) involves—~~

~~"(i) the placing, receiving, or otherwise making of bets or wagers; or~~

"(ii) the offering to engage in the placing, receiving, or otherwise making of bets or wagers;

"(B) involves 1 or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(C) has been or remains in substantially continuous operation for a period in excess of 10 days or has a gross revenue of $2,000 or more from such business during any 24-hour period.

"(5) INFORMATION ASSISTING IN THE PLACING OF A BET OR WAGER.—The term 'information assisting in the placing of a bet or wager'—

"(A) means information that is intended by the sender or recipient to be used by a person engaged in the business of betting or wagering to accept or place a bet or wager; and

"(B) does not include—

"(i) information concerning parimutuel pools that is exchanged exclusively between or among 1 or more racetracks or other parimutuel wagering facilities licensed by the State or approved by the foreign jurisdiction in which the facility is lo-

~~cated, and 1 or more parimutuel wagering facilities licensed by the State or approved by the foreign jurisdiction in which the facility is located, if that information is used only to conduct common pool parimutuel pooling under applicable law;~~

~~"(ii) information exchanged exclusively between or among 1 or more racetracks or other parimutuel wagering facilities licensed by the State or approved by the foreign jurisdiction in which the facility is located, and a support service located in another State or foreign jurisdiction, if the information is used only for processing bets or wagers made with that facility under applicable law;~~

~~"(iii) information exchanged exclusively between or among 1 or more wagering facilities that are located within a single State and are licensed and regulated by that State, and any support service, wherever located, if the information is used only for the pooling or processing of bets or wagers made by or with the facility or facilities under applicable State law;~~

"(iv) any news reporting or analysis of wagering activity, including odds, racing or event results, race and event schedules, or categories of wagering; or

"(v) any posting or reporting of any educational information on how to make a bet or wager or the nature of betting or wagering.

"(6) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service, system, or access software provider that uses a public communication infrastructure or operates in interstate or foreign commerce to provide or enable computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.

"(7) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

"(8) PERSON.—The term 'person' means any individual, association, partnership, joint venture, corporation, State or political subdivision thereof, department, agency, or instrumentality of a State or political subdivision thereof, or any other govern-

ment, organization, or entity (including any governmental entity (as defined in section 3701(2) of title 28, United States Code)).

"(9) PRIVATE NETWORK.—The term 'private network' means a communications channel or channels, including voice or computer data transmission facilities, that use either—

"(A) private dedicated lines; or

"(B) the public communications infrastructure, if the infrastructure is secured by means of the appropriate private communications technology to prevent unauthorized access.

"(10) STATE.—The term 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory, or possession of the United States.

"(11) SUBSCRIBER.—The term 'subscriber'—

"(A) means any person with a business relationship with the interactive computer service provider through which such person receives access to the system, service, or network of that provider, even if no formal subscription agreement exists; and

"(B) includes registrants, students who are granted access to a university system or net-

~~work, and employees who are granted access to the system or network of their employer.~~

~~"(b) GAMBLING BUSINESSES.—~~

~~"(1) PROHIBITION.—Subject to subsection (d), it shall be unlawful for a person engaged in a gambling business to use the Internet or any other interactive computer service—~~

~~"(A) to place, receive, or otherwise make a bet or wager; or~~

~~"(B) to send, receive, or invite information assisting in the placing of a bet or wager.~~

~~"(2) PENALTIES.—A person engaged in a gambling business who violates paragraph (1) shall be—~~

~~"(A) fined in an amount equal to not more than the greater of—~~

~~"(i) the amount that such person received in bets or wagers as a result of engaging in that business in violation of this subsection; or~~

~~"(ii) $20,000;~~

~~"(B) imprisoned not more than 4 years; or~~

~~"(C) both.~~

~~"(c) PERMANENT INJUNCTIONS.—Upon conviction of a person under this section, the court may, as an additional penalty, enter a permanent injunction enjoining the~~

transmission of bets or wagers or information assisting in the placing of a bet or wager.

"(d) APPLICABILITY.—

"(1) IN GENERAL.—Subject to paragraph (2), the prohibition in this section does not apply to—

"(A) any otherwise lawful bet or wager that is placed, received, or otherwise made wholly intrastate for a State lottery, or for a multi-State lottery operated jointly between 2 or more States in conjunction with State lotteries if—

"(i) each such lottery is expressly authorized, and licensed or regulated, under applicable State law;

"(ii) the bet or wager is placed on an interactive computer service that uses a private network;

"(iii) each person placing or otherwise making that bet or wager is physically located when such bet or wager is placed at a facility that is open to the general public; and

"(iv) each such lottery complies with sections 1301 through 1304 of title 18,

United States Code, and other applicable provisions of Federal law;

"(B) any otherwise lawful bet or wager that is placed, received, or otherwise made on an interstate or intrastate basis on a live horse race, or the sending, receiving, or inviting of information assisting in the placing of such a bet or wager, if such bet or wager, or the transmission of such information, as applicable, is—

"(i) expressly authorized, and licensed or regulated by the State in which such bet or wager is received, under applicable Federal and such State's laws;

"(ii) placed on a closed-loop subscriber-based service;

"(iii) initiated from a State in which betting or wagering on that same type of live horse racing is lawful and received in a State in which such betting or wagering is lawful;

"(iv) subject to the regulatory oversight of the State in which the bet or wager is received and subject by such State to minimum control standards for the accounting, regulatory inspection, and

auditing of all such bets or wagers transmitted from 1 State to another; and

"(v) made in accordance with the Interstate Horse Racing Act of 1978 (15 U.S.C. 3001 et seq.); or

"(C) any otherwise lawful bet or wager that is placed, received, or otherwise made for a fantasy sports league game or contest.

"(2) INAPPLICABILITY TO BETS OR WAGERS MADE BY AGENTS OR PROXIES.—

"(A) IN GENERAL.—Paragraph (1)(A) does not apply in any case in which a bet or wager is placed, received, or otherwise made by the use of an agent or proxy using the Internet or an interactive computer service.

"(B) RULE OF CONSTRUCTION.—Nothing in this paragraph may be construed to prohibit the owner operator of a parimutuel wagering facility that is licensed by a State from employing an agent in the operation of the account wagering system owned or operated by the parimutuel facility.".

(b) TECHNICAL AMENDMENT.—The analysis for chapter 50 of title 18, United States Code, is amended by adding at the end the following:

"1085. Internet gambling.".

SEC. 3. CIVIL REMEDIES.

(a) IN GENERAL.—

(1) JURISDICTION.—The district courts of the United States shall have original, exclusive, and continuing jurisdiction to prevent and restrain violations of section 1085 of title 18, United States Code, as added by section 2 of this Act, by issuing appropriate orders in accordance with this section, regardless of whether a prosecution has been initiated under that section.

(2) PROCEEDINGS.—

(A) INSTITUTION BY FEDERAL GOVERNMENT.—

(i) IN GENERAL.—The United States may institute proceedings under this subsection to prevent or restrain a violation of section 1085 of title 18, United States Code.

(ii) RELIEF.—Upon application of the United States under this subparagraph, the district court may enter a temporary restraining order or an injunction against any person to prevent a violation of section 1085 of title 18, United States Code, if the court determines, after notice and an opportunity for a hearing, that there is a

substantial probability that such violation has occurred or will occur.

(B) INSTITUTION BY STATE ATTORNEY GENERAL.—

(i) IN GENERAL.—The attorney general of a State (or other appropriate State official) in which a violation of section 1085 of title 18, United States Code, is alleged to have occurred, or may occur, after providing written notice to the United States, may institute proceedings under this subsection to prevent or restrain the violation, unless the United States has exclusive jurisdiction over the violation under Federal law.

(ii) RELIEF.—Upon application of the attorney general (or other appropriate State official) of an affected State under this subparagraph, the district court may enter a temporary restraining order or an injunction against any person to prevent a violation of section 1085 of title 18, United States Code, if the court determines, after notice and an opportunity for a hearing,

that there is a substantial probability that such violation has occurred or will occur.

(C) EXPIRATION.—Any temporary restraining order or preliminary injunction entered pursuant to subparagraph (A) or (B) shall expire if, and as soon as, the United States, or the attorney general (or other appropriate State official) of the State, as applicable, notifies the court that issued the injunction that the United States or the State, as applicable, will not seek a permanent injunction.

(3) EXPEDITED PROCEEDINGS.—

(A) IN GENERAL.—In addition to any proceeding under paragraph (2), a district court may enter a temporary restraining order against a person alleged to be in violation of section 1085 of title 18, United States Code, upon application of the United States under paragraph (2)(A) of this subsection, or the attorney general (or other appropriate State official) of an affected State under paragraph (2)(B) of this subsection, without notice and the opportunity for a hearing, if the United States or the State, as applicable, demonstrates that there is probable cause to believe that the

use of the Internet or other interactive computer service at issue violates section 1085 of title 18, United States Code.

(B) EXPIRATION.—A temporary restraining order entered under this paragraph shall expire on the earlier of—

(i) the expiration of the 30-day period beginning on the date on which the order is entered; or

(ii) the date on which a preliminary injunction is granted or denied.

(C) HEARINGS.—A hearing requested concerning an order entered under this paragraph shall be held at the earliest practicable time.

(b) INTERACTIVE COMPUTER SERVICE PROVIDERS.—

(1) ELIGIBILITY.—For purposes of this subsection, an interactive computer service provider is described in this paragraph only if the provider has established and reasonably implements a policy that provides for the termination of the account of a subscriber of the service system or network of the provider upon the receipt by the provider of a notice described in paragraph (4)(B).

~~(2) USE OF FACILITIES OR SERVICES.—Nothing in section 1085 of title 18, United States Code, may be constructed to impose, or to provide any basis for, liability against an interactive computer service provider described in paragraph (1) whose facilities or services are used by another person to engage in an activity prohibited by that section—~~

~~(A) arising out of any transmitting, routing, or providing of connections for the material or activity (including intermediate and temporary storage in the course of such transmitting, routing, or providing connections) by the provider, if—~~

~~(i) the material or activity was initiated by or at the direction of a person other than the provider;~~

~~(ii) the transmitting, routing, or providing of connections is carried out through an automatic process without selection of the material or activity by the provider;~~

~~(iii) the provider does not select the recipients of the material or activity, except as an automatic response to the request of another person; and~~

(iv) the material or activity is transmitted through the system or network of the provider without modification of its content; or

(B) with respect to material or activity at an online site residing on a computer server owned, controlled, or operated by or for the provider, unless the provider fails to comply within a reasonable time with a notification under paragraph (4) with respect to the particular material or activity at issue.

(3) PROTECTION OF PRIVACY.—Nothing in this section or in section 1085 of title 18, United States Code, may be construed to impose or authorize an obligation on an interactive computer service described in paragraph (1) to—

(A) monitor material or use of its service; or

(B) except as required by an order of a court, to gain access to, to remove, or to disable access to material in any case in which such conduct is prohibited by law.

(4) NOTICE TO INTERACTIVE COMPUTER SERVICE PROVIDERS.—

~~(A) IN GENERAL.—If an interactive computer service provider receives from a Federal or State law enforcement agency, acting within its jurisdiction, a written or electronic notice described in subparagraph (B), that a particular online site residing on a computer server owned, controlled, or operated by or for the provider is being used to violate section 1085 of title 18, United States Code, the provider shall not be liable under any Federal or State law if, in a reasonably expeditious manner—~~

~~(i) the provider removes or disables access to the material or activity residing at that online site that allegedly violates that section; or~~

~~(ii) if the provider does not own, operate, or control the site at which the subject material or activity resides, the provider notifies the Federal or State law enforcement agency that—~~

~~(I) the provider is not the proper recipient of such notice, and~~

~~(II) upon receipt of a subpoena, the provider will cooperate with the Federal or State law enforcement~~

~~agency in identifying the person or persons who control the site.~~

~~(B) NOTICE.—A notice is described in this subparagraph if it—~~

~~(i) identifies the material or activity that allegedly violates section 1085 of title 18, United States Code;~~

~~(ii) provides information reasonably sufficient to permit the provider to locate the material or activity;~~

~~(iii) is supplied to any agent of a provider designated under section 512 of title 17, United States Code, if information regarding such designation is readily available to the public; and~~

~~(iv) provides information that is reasonably sufficient to permit the provider to contact the law enforcement agency that issued the notice, including—~~

~~(I) the name of the law enforcement agency; and~~

~~(II) the name and telephone number of an individual to contact at the law enforcement agency, and, if~~

~~available, the electronic mail address of that individual.~~

~~(5) INJUNCTIVE RELIEF.—~~

~~(A) IN GENERAL.—Except as provided in subparagraph (B), a Federal or State law enforcement agency acting within its jurisdiction, may, following the issuance of a notice to an interactive computer service provider under paragraph (4), in a civil action, obtain an injunction or other appropriate relief to prevent the use of the interactive computer service in violation of Federal or State law.~~

~~(B) OTHER LIMITATIONS.—In the case of any application for an injunction against an interactive computer service provider to prevent a violation of section 1085 of title 18, United States Code—~~

~~(i) arising out of the transmitting, routing, or providing of connections by the provider for material or activity that is prohibited by section 1085 of title 18, United States Code, or performing the intermediate and temporary storage of such material or activity in the course of such transmitting, routing, or providing of con-~~

~~nections, the injunctive relief is limited to—~~

~~(I) an order restraining the provider from providing access to an identified subscriber of the system or network of the interactive computer service provider, who is using that access to violate section 1085 of title 18, United States Code (or whose use of that access involves a violation of section 1085 of title 18, United States Code, by another person), by terminating the specified account of that subscriber; and~~

~~(II) an order restraining the provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, foreign online location;~~

~~(ii) with respect to conduct other than that which qualifies for the limitation on remedies set forth in clause (i), the injunctive relief is limited to—~~

~~(I) an order restraining the provider from providing access to a matc-~~

~~rial or activity that violates section 1085 of title 18, United States Code, at a particular online site residing on a computer server, owned, operated, or controlled by the provider;~~

~~(II) an order restraining the provider from providing access to a subscriber of the system or network of the interactive computer service, who is identified in the order and who is using such service in violation of section 1085 of title 18, United States Code, by terminating the specified account of that subscriber; or~~

~~(III) such other injunctive remedies as the court considers necessary to prevent or restrain access to specified material or activity that is prohibited by section 1085 of title 18, United States Code, at a particular online location residing on a computer server owned, operated, or controlled by the provider, that are the least burdensome to the provider among the~~

~~forms of relief that are comparably effective for that purpose.~~

~~(C) CONSIDERATIONS.—The court, in determining appropriate injunctive relief under this paragraph, shall consider—~~

~~(i) whether such an injunction, either alone or in combination with other such injunctions issued against the same provider (under section 1085 of title 18, United States Code, or under this section) would significantly burden either the provider or the operation of the system or network of the provider;~~

~~(ii) whether implementation of such an injunction would be technically feasible and effective, and would not unreasonably interfere with access to lawful material at other online locations;~~

~~(iii) whether other less burdensome and comparably effective means of preventing or restraining access to the illegal material or activity are available; and~~

~~(iv) the magnitude of the harm likely to be suffered by the community if the injunction is not granted.~~

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~~(D) NOTICE AND EX PARTE ORDERS.—Injunctive relief under this paragraph shall not be available without notice to the service provider and an opportunity for such provider to appear before the court, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the communications network of the service provider.~~

~~(6) EFFECT ON OTHER LAW.—~~

~~(A) PREEMPTION OF STATE LAW.—An interactive computer service provider described in paragraph (1) shall not be liable under any State law prohibiting or regulating gambling, or subject to any injunctive relief under any such State law, in connection with the use of the interactive computer service of that provider by any person in interstate or affecting commerce.~~

~~(B) IMMUNITY FROM LIABILITY.—In the absence of fraud or bad faith, an interactive computer service provider described in paragraph (1) shall not be liable for any damages, penalty, or forfeiture, civil or criminal, under Federal or State law for—~~

(i) taking any action described in paragraph (1) or paragraph 4(A) to comply with a notice described in paragraph (4)(B); or

(ii) complying with any court order issued under paragraph (5).

(c) RELATIONSHIP TO OTHER REMEDIES.—

(1) IN GENERAL.—Except as provided in subsection (b)(6), nothing in this section may be construed to affect any remedy under section 1085 of title 18, United States Code, or under any other provision of Federal or State law.

(2) AVAILABILITY OF RELIEF.—The availability of relief under this section shall not depend on, or be affected by, the initiation or resolution of any action under section 1085 of title 18, United States Code, or under any other provision of Federal or State law.

SEC. 4. RULE OF CONSTRUCTION.

Except as provided in section 3(b)(6) of this Act, nothing in this Act or in section 1085 of title 18, United States Code, as added by section 2 of this Act, may be construed otherwise to affect any prohibition or remedy relating to gambling that is imposed under any other provision of Federal or State law.

~~SEC. 5. REPORT ON ENFORCEMENT.~~

~~Not later than 3 years after the date of enactment of this Act, the Attorney General shall submit to Congress a report, which shall include—~~

~~(1) an analysis of the problems, if any, associated with enforcing section 1085 of title 18, United States Code, as added by section 2 of this Act;~~

~~(2) recommendations for the best use of the resources of the Department of Justice to enforce that section; and~~

~~(3) an estimate of the amount of activity and money being used to gamble on the Internet.~~

~~SEC. 6. SEVERABILITY.~~

~~If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.~~

SECTION 1. SHORT TITLE.

This Act may be cited as the "Internet Gambling Prohibition Act of 1999".

SEC. 2. PROHIBITION ON INTERNET GAMBLING.

(a) IN GENERAL.—Chapter 50 of title 18, United States Code, is amended by adding at the end the following:

"§1085. Internet gambling

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"(A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game of chance, upon an agreement or understanding that the person or another person will receive something of value based on that outcome;

"(B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

"(C) includes any scheme of a type described in section 3702 of title 28; and

"(D) does not include—

"(i) a bona fide business transaction governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))) for the purchase or sale at a future date of securities (as that term is defined in section 3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(10)));

"(ii) a transaction on or subject to the rules of a contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7);

"(iii) a contract of indemnity or guarantee; or

"(iv) a contract for life, health, or accident insurance.

"(2) CLOSED-LOOP SUBSCRIBER-BASED SERVICE.—The term 'closed-loop subscriber-based service' means any information service or system that uses—

"(A) a device or combination of devices—

"(i) expressly authorized and operated in accordance with the laws of a State, exclusively for placing, receiving, or otherwise making a bet or wager described in subsection (f)(1)(B); and

"(ii) by which a person located within any State must subscribe and be registered with the provider of the wagering service by name, address, and appropriate billing information to be authorized to place, receive, or otherwise make a bet or wager, and must be physically located within that State in order to be authorized to do so;

"(B) an effective customer verification and age verification system, expressly authorized and operated in accordance with the laws of the State in which it is located, to ensure that all applicable Federal and State legal and regulatory requirements for lawful gambling are met; and

"(C) appropriate data security standards to prevent unauthorized access by any person who has not subscribed or who is a minor.

"(3) FOREIGN JURISDICTION.—The term 'foreign jurisdiction' means a jurisdiction of a foreign country or political subdivision thereof.

"(4) GAMBLING BUSINESS.—The term 'gambling business' means—

"(A) a business that is conducted at a gambling establishment, or that—

"(i) involves—

"(I) the placing, receiving, or otherwise making of bets or wagers; or

"(II) the offering to engage in the placing, receiving, or otherwise making of bets or wagers;

"(ii) involves 1 or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of 10 days or has a gross revenue of $2,000 or more from such business during any 24-hour period; and

"(B) any soliciting agent of a business described in subparagraph (A).

"(5) INFORMATION ASSISTING IN THE PLACING OF A BET OR WAGER.—The term 'information assisting in the placing of a bet or wager'—

"(A) means information that is intended by the sender or recipient to be used by a person engaged in the business of betting or wagering to place, receive, or otherwise make a bet or wager; and

"(B) does not include—

"(i) information concerning parimutuel pools that is exchanged exclusively between or among 1 or more racetracks or other parimutuel wagering facilities licensed by the State or approved by the foreign jurisdiction in which the facility is located, and 1 or more parimutuel wagering facilities licensed by the State or approved by the foreign jurisdiction in which the fa-

cility is located, if that information is used only to conduct common pool parimutuel pooling under applicable law;

"(ii) information exchanged exclusively between or among 1 or more racetracks or other parimutuel wagering facilities licensed by the State or approved by the foreign jurisdiction in which the facility is located, and a support service located in another State or foreign jurisdiction, if the information is used only for processing bets or wagers made with that facility under applicable law;

"(iii) information exchanged exclusively between or among 1 or more wagering facilities that are located within a single State and are licensed and regulated by that State, and any support service, wherever located, if the information is used only for the pooling or processing of bets or wagers made by or with the facility or facilities under applicable State law;

"(iv) any news reporting or analysis of wagering activity, including odds, racing or

event results, race and event schedules, or categories of wagering; or

"(v) any posting or reporting of any educational information on how to make a bet or wager or the nature of betting or wagering.

"(6) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service, system, or access software provider that operates in, or uses a channel or instrumentality of, interstate or foreign commerce to provide or enable access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.

"(7) INTERACTIVE COMPUTER SERVICE PROVIDER.—The term 'interactive computer service provider' means any person that provides an interactive computer service, to the extent that such person offers or provides such service.

"(8) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

"(9) PERSON.—The term 'person' means any individual, association, partnership, joint venture, cor-

poration (or any affiliate of a corporation), State or political subdivision thereof, department, agency, or instrumentality of a State or political subdivision thereof, or any other government, organization, or entity (including any governmental entity (as defined in section 3701(2) of title 28)).

"(10) PRIVATE NETWORK.—The term 'private network' means a communications channel or channels, including voice or computer data transmission facilities, that use either—

"(A) private dedicated lines; or

"(B) the public communications infrastructure, if the infrastructure is secured by means of the appropriate private communications technology to prevent unauthorized access.

"(11) STATE.—The term 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory, or possession of the United States.

"(12) SUBSCRIBER.—The term 'subscriber'—

"(A) means any person with a business relationship with the interactive computer service provider through which such person receives access to the system, service, or network of that

provider, even if no formal subscription agreement exists; and

"(B) includes registrants, students who are granted access to a university system or network, and employees or contractors who are granted access to the system or network of their employer.

"(b) INTERNET GAMBLING.—

"(1) PROHIBITION.—Subject to subsection (f), it shall be unlawful for a person engaged in a gambling business knowingly to use the Internet or any other interactive computer service—

"(A) to place, receive, or otherwise make a bet or wager; or

"(B) to send, receive, or invite information assisting in the placing of a bet or wager.

"(2) PENALTIES.—A person engaged in a gambling business who violates this section shall be—

"(A) fined in an amount equal to not more than the greater of—

"(i) the total amount that such person bet or wagered, or placed, received, or accepted in bets or wagers, as a result of engaging in that business in violation of this section; or

"(ii) $20,000;

"(B) imprisoned not more than 4 years; or

"(C) both.

"(3) PERMANENT INJUNCTIONS.—Upon conviction of a person under this section, the court may enter a permanent injunction enjoining such person from placing, receiving, or otherwise making bets or wagers or sending, receiving, or inviting information assisting in the placing of bets or wagers.

"(c) CIVIL REMEDIES.—

"(1) JURISDICTION.—The district courts of the United States shall have original and exclusive jurisdiction to prevent and restrain violations of this section by issuing appropriate orders in accordance with this section, regardless of whether a prosecution has been initiated under this section.

"(2) PROCEEDINGS.—

"(A) INSTITUTION BY FEDERAL GOVERNMENT.—

"(i) IN GENERAL.—The United States may institute proceedings under this subsection to prevent or restrain a violation of this section.

"(ii) RELIEF.—Upon application of the United States under this subparagraph, the district court may enter a temporary re-

straining order or an injunction against any person to prevent or restrain a violation of this section if the court determines, after notice and an opportunity for a hearing, that there is a substantial probability that such violation has occurred or will occur.

"(B) INSTITUTION BY STATE ATTORNEY GENERAL.—

"(i) IN GENERAL.—The attorney general of a State (or other appropriate State official) in which a violation of this section allegedly has occurred or will occur, after providing written notice to the United States, may institute proceedings under this subsection to prevent or restrain the violation.

"(ii) RELIEF.—Upon application of the attorney general (or other appropriate State official) of an affected State under this subparagraph, the district court may enter a temporary restraining order or an injunction against any person to prevent or restrain a violation of this section if the court determines, after notice and an oppor-

tunity for a hearing, that there is a substantial probability that such violation has occurred or will occur.

"(C) INDIAN LANDS.—Notwithstanding subparagraphs (A) and (B), for a violation that is alleged to have occurred, or may occur, on Indian lands (as that term is defined in section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703))—

"(i) the United States shall have the enforcement authority provided under subparagraph (A); and

"(ii) the enforcement authorities specified in an applicable Tribal-State compact negotiated under section 11 of the Indian Gaming Regulatory Act (25 U.S.C. 2710) shall be carried out in accordance with that compact.

"(D) EXPIRATION.—Any temporary restraining order or preliminary injunction entered pursuant to subparagraph (A) or (B) shall expire if, and as soon as, the United States, or the attorney general (or other appropriate State official) of the State, as applicable, notifies the court that issued the order or injunction that the

United States or the State, as applicable, will not seek a permanent injunction.

"(3) EXPEDITED PROCEEDINGS.—

"(A) IN GENERAL.—In addition to any proceeding under paragraph (2), a district court may, in exigent circumstances, enter a temporary restraining order against a person alleged to be in violation of this section upon application of the United States under paragraph (2)(A), or the attorney general (or other appropriate State official) of an affected State under paragraph (2)(B), without notice and the opportunity for a hearing as provided in rule 65(b) of the Federal Rules of Civil Procedure (except as provided in subsection (d)(3)), if the United States or the State, as applicable, demonstrates that there is probable cause to believe that the use of the Internet or other interactive computer service at issue violates this section.

"(B) HEARINGS.—A hearing requested concerning an order entered under this paragraph shall be held at the earliest practicable time.

"(d) INTERACTIVE COMPUTER SERVICE PROVIDERS.—

"(1) IMMUNITY FROM LIABILITY FOR USE BY ANOTHER.—

"(A) IN GENERAL.—An interactive computer service provider described in subparagraph (B) shall not be liable, under this section or any other provision of Federal or State law prohibiting or regulating gambling or gambling-related activities, for the use of its facilities or services by another person to engage in Internet gambling activity that violates such law—

"(i) arising out of any transmitting, routing, or providing of connections for gambling-related material or activity (including intermediate and temporary storage in the course of such transmitting, routing, or providing connections) by the provider, if—

"(I) the material or activity was initiated by or at the direction of a person other than the provider;

"(II) the transmitting, routing, or providing of connections is carried out through an automatic process without selection of the material or activity by the provider;

"(III) the provider does not select the recipients of the material or activ-

ity, except as an automatic response to the request of another person; and

"(IV) the material or activity is transmitted through the system or network of the provider without modification of its content; or

"(ii) arising out of any gambling-related material or activity at an online site residing on a computer server owned, controlled, or operated by or for the provider, or arising out of referring or linking users to an online location containing such material or activity, if the material or activity was initiated by or at the direction of a person other than the provider, unless the provider fails to take expeditiously, with respect to the particular material or activity at issue, the actions described in paragraph (2)(A) following the receipt by the provider of a notice described in paragraph (2)(B).

"(B) ELIGIBILITY.—An interactive computer service provider is described in this subparagraph only if the provider—

"(i) maintains and implements a written or electronic policy that requires the

provider to terminate the account of a subscriber of its system or network expeditiously following the receipt by the provider of a notice described in paragraph (2)(B) alleging that such subscriber has violated or is violating this section; and

"(ii) with respect to the particular material or activity at issue, has not knowingly permitted its computer server to be used to engage in activity that the provider knows is prohibited by this section, with the specific intent that such server be used for such purpose.

"(2) NOTICE TO INTERACTIVE COMPUTER SERVICE PROVIDERS.—

"(A) IN GENERAL.—If an interactive computer service provider receives from a Federal or State law enforcement agency, acting within its authority and jurisdiction, a written or electronic notice described in subparagraph (B), that a particular online site residing on a computer server owned, controlled, or operated by or for the provider is being used by another person to violate this section, the provider shall expeditiously—

"(i) remove or disable access to the material or activity residing at that online site that allegedly violates this section; or

"(ii) in any case in which the provider does not control the site at which the subject material or activity resides, the provider, through any agent of the provider designated in accordance with section 512(c)(2) of title 17, or other responsible identified employee or contractor—

"(I) notify the Federal or State law enforcement agency that the provider is not the proper recipient of such notice; and

"(II) upon receipt of a subpoena, cooperate with the Federal or State law enforcement agency in identifying the person or persons who control the site.

"(B) NOTICE.—A notice is described in this subparagraph only if it—

"(i) identifies the material or activity that allegedly violates this section, and alleges that such material or activity violates this section;

"(ii) provides information reasonably sufficient to permit the provider to locate (and, as appropriate, in a notice issued pursuant to paragraph (3)(A) to block access to) the material or activity;

"(iii) is supplied to any agent of a provider designated in accordance with section 512(c)(2) of title 17, if information regarding such designation is readily available to the public;

"(iv) provides information that is reasonably sufficient to permit the provider to contact the law enforcement agency that issued the notice, including the name of the law enforcement agency, and the name and telephone number of an individual to contact at the law enforcement agency (and, if available, the electronic mail address of that individual); and

"(v) declares under penalties of perjury that the person submitting the notice is an official of the law enforcement agency described in clause (iv).

"(3) INJUNCTIVE RELIEF.—

"(A) IN GENERAL.—The United States, or a State law enforcement agency acting within its authority and jurisdiction, may, not less than 24 hours following the issuance to an interactive computer service provider of a notice described in paragraph (2)(B), in a civil action, obtain a temporary restraining order, or an injunction to prevent the use of the interactive computer service by another person in violation of this section.

"(B) LIMITATIONS.—Notwithstanding any other provision of this section, in the case of any application for a temporary restraining order or an injunction against an interactive computer service provider described in paragraph (1)(B) to prevent a violation of this section—

"(i) arising out of activity described in paragraph (1)(A)(i), the injunctive relief is limited to—

"(I) an order restraining the provider from providing access to an identified subscriber of the system or network of the interactive computer service provider, if the court determines that there is probable cause to believe that such subscriber is using that ac-

cess to violate this section (or to engage with another person in a communication that violates this section), by terminating the specified account of that subscriber; and

"(II) an order restraining the provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, foreign online location;

"(ii) arising out of activity described in paragraph (1)(A)(ii), the injunctive relief is limited to—

"(I) the orders described in clause (i)(I);

"(II) an order restraining the provider from providing access to the material or activity that violates this section at a particular online site residing on a computer server operated or controlled by the provider; and

"(III) such other injunctive remedies as the court considers necessary to prevent or restrain access to specified material or activity that is prohib-

ited by this section at a particular online location residing on a computer server operated or controlled by the provider, that are the least burdensome to the provider among the forms of relief that are comparably effective for that purpose.

"(C) CONSIDERATIONS.—The court, in determining appropriate injunctive relief under this paragraph, shall consider—

"(i) whether such an injunction, either alone or in combination with other such injunctions issued, and currently operative, against the same provider would significantly (and, in the case of relief under subparagraph (B)(ii), taking into account, among other factors, the conduct of the provider, unreasonably) burden either the provider or the operation of the system or network of the provider;

"(ii) whether implementation of such an injunction would be technically feasible and effective, and would not materially interfere with access to lawful material at other online locations;

"(iii) whether other less burdensome and comparably effective means of preventing or restraining access to the illegal material or activity are available; and

"(iv) the magnitude of the harm likely to be suffered by the community if the injunction is not granted.

"(D) NOTICE AND EX PARTE ORDERS.—Injunctive relief under this paragraph shall not be available without notice to the service provider and an opportunity for such provider to appear before the court, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the communications network of the service provider.

"(4) EFFECT ON OTHER LAW.—

"(A) IMMUNITY FROM LIABILITY FOR COMPLIANCE.—An interactive computer service provider shall not be liable for any damages, penalty, or forfeiture, civil or criminal, under Federal or State law for taking in good faith any action described in paragraph (2)(A) to comply with a notice described in paragraph (2)(B), or complying with any court order issued under paragraph (3).

"(B) DISCLAIMER OF OBLIGATIONS.—Nothing in this section may be construed to impose or authorize an obligation on an interactive computer service provider described in paragraph (1)(B)—

"(i) to monitor material or use of its service; or

"(ii) except as required by a notice or an order of a court under this subsection, to gain access to, to remove, or to disable access to material.

"(C) RIGHTS OF SUBSCRIBERS.—Nothing in this section may be construed to prejudice the right of a subscriber to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that the account of such subscriber should not be terminated pursuant to this subsection, or should be restored.

"(e) AVAILABILITY OF RELIEF.—The availability of relief under subsections (c) and (d) shall not depend on, or be affected by, the initiation or resolution of any action under subsection (b), or under any other provision of Federal or State law.

"(f) APPLICABILITY.—

"(1) IN GENERAL.—Subject to paragraph (2), the prohibition in this section does not apply to—

"(A) any otherwise lawful bet or wager that is placed, received, or otherwise made wholly intrastate for a State lottery, or for a multi-State lottery operated jointly between 2 or more States in conjunction with State lotteries if—

"(i) each such lottery is expressly authorized, and licensed or regulated, under applicable State law;

"(ii) the bet or wager is placed on an interactive computer service that uses a private network;

"(iii) each person placing or otherwise making that bet or wager is physically located when such bet or wager is placed at a facility that is open to the general public; and

"(iv) each such lottery complies with sections 1301 through 1304, and other applicable provisions of Federal law;

"(B) any otherwise lawful bet or wager that is placed, received, or otherwise made on an interstate or intrastate basis on a live horse or a live dog race, or the sending, receiving, or in-

viting of information assisting in the placing of such a bet or wager, if such bet or wager, or the transmission of such information, as applicable, is—

"(i) expressly authorized, and licensed or regulated by the State in which such bet or wager is received, under applicable Federal and such State's laws;

"(ii) placed on a closed-loop subscriber-based service;

"(iii) initiated from a State in which betting or wagering on that same type of live horse or live dog racing is lawful and received in a State in which such betting or wagering is lawful;

"(iv) subject to the regulatory oversight of the State in which the bet or wager is received and subject by such State to minimum control standards for the accounting, regulatory inspection, and auditing of all such bets or wagers transmitted from 1 State to another; and

"(v) in the case of—

"(I) live horse racing, made in accordance with the Interstate Horse

Racing Act of 1978 (15 U.S.C. 3001 et seq.); or

"(II) live dog racing, subject to consent agreements that are comparable to those required by the Interstate Horse Racing Act of 1978, approved by the appropriate State regulatory agencies, in the State receiving the signal, and in the State in which the bet or wager originates; or

"(C) any otherwise lawful bet or wager that is placed, received, or otherwise made for a fantasy sports league game or contest.

"(2) BETS OR WAGERS MADE BY AGENTS OR PROXIES.—

"(A) IN GENERAL.—Paragraph (1) does not apply in any case in which a bet or wager is placed, received, or otherwise made by the use of an agent or proxy using the Internet or an interactive computer service.

"(B) QUALIFICATION.—Nothing in this paragraph may be construed to prohibit the owner operator of a parimutuel wagering facility that is licensed by a State from employing an agent in the operation of the account wagering

system owned or operated by the parimutuel facility.

"(3) ADVERTISING AND PROMOTION.—The prohibition of subsection (b)(1)(B) does not apply to advertising or promotion of any activity that is not prohibited by subsection (b)(1)(A).

"(g) RULE OF CONSTRUCTION.—Nothing in this section may be construed to affect any prohibition or remedy applicable to a person engaged in a gambling business under any other provision of Federal or State law.".

(b) TECHNICAL AMENDMENT.—The analysis for chapter 50 of title 18, United States Code, is amended by adding at the end the following:

"1085. Internet gambling.".

SEC. 3. REPORT ON ENFORCEMENT.

Not later than 3 years after the date of enactment of this Act, the Attorney General shall submit to Congress a report, which shall include—

(1) an analysis of the problems, if any, associated with enforcing section 1085 of title 18, United States Code, as added by section 2 of this Act;

(2) recommendations for the best use of the resources of the Department of Justice to enforce that section; and

(3) an estimate of the amount of activity and money being used to gamble on the Internet.

SEC. 4. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of this Act and the provisions of such amendments to any other person or circumstance shall not be affected thereby.

The CHAIRMAN. With that, I look forward to hearing our witnesses today, and welcome Senator Inouye.

Do you have a statement, Senator Inouye?

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Thank you very much, Mr. Chairman.

I thank you very much for calling this hearing this morning, particularly in light of the impending consideration of the Committee on Judiciary of this measure.

As one of the primary sponsors of the Indian Gaming Regulatory Act, I have a vivid recollection of the negotiations that surrounded the passage of that act. Tribal governments acquiesced in what was then, and is now, a fairly dramatic departure from the existing framework of Federal Indian law—namely, the authorization for State law to be applied as the determining factor in the scope of gaming that could be conducted.

In exchange there were other areas in which we tried our best to anticipate the changes that might come about in the technology associated with gaming. We had no crystal ball so we could not envision what technological evolution might bring about with any precision, and we certainly did not anticipate that Indian gaming would become as widespread as it has become.

On the other hand, one of the dynamics that we did forecast with a fair degree of accuracy was that not all Indian gaming operations would be met with a measure of financial success.

Of course, we knew at that time that there were many tribes—probably most of the tribes located in such remote areas that it was unlikely that gaming would prove to be any kind of panacea for the miserable poverty that plagues so many reservation communities, and so we made certain that the law was not only flexible enough, but explicitly contemplated that Indian governments could collaborate in gaming activities.

The playing of games on Indian lands was intended to encompass the fact that the actual game or games might be conducted on one's tribes' reservation but players located on other reservations could participate in the gaming. This would require the use of telephones and other telecommunications technology that would enable players at more remote tribal locations to be connected both visually and by sound to a centralized tribal gaming operation.

In this way, tribal governments could both share in the costs of operating games and share in whatever revenues might be forthcoming. It would reduce the cost of administration to all, while not foreclosing rurally-isolated tribes from exercising their rights under the act.

This has been, and remains to be, one of the central concerns with the Internet Gaming Prohibition Act because while there are a number of exceptions carved out in that act for government-sponsored gaming, like the State and Inter-State lotteries. There is no such exception or even a recognition that the revenues derived from tribal government gaming also go directly to support the functions of tribal governments, just as State lotteries support the governmental activities of the States. Other exceptions from the prohibitions of the Act include betting on live horse or dog races that

are conducted under the Interstate Horse Racing Act and betting on fantasy sports leagues, but, again, there is no exception to recognize the fact that the Indian Gaming Regulatory Act authorizes the use of telecommunications technology, and under that rubric I think would fall interactive computer services.

We tried in vain, as it turns out in the last session of the Congress, to bring to the attention of the sponsors of this measure that the bill should not prohibit activities that are authorized under Federal law and for which there are investment-backed expectations upon which tribal governments have justifiably relied for the past 11 years.

If there is going to be a wholesale repeal of the provisions of the Indian Gaming Regulatory Act, it must be explicit, it must be warranted and it must be given consideration by the committee of primary jurisdiction in the Senate over this law, and that is this committee.

It is for these reasons that I have joined Chairman Campbell in seeking a sequential referral of S. 692 to the Committee on Indian Affairs once the Judiciary Committee has completed its consideration of the bill.

Mr. Chairman, I look forward to the testimony of the witnesses today and to working with the sponsors of this measure to ensure that the activities authorized by the Indian Gaming Regulatory Act do not come within the prohibitions that this bill is designed to put in place.

Thank you very much, sir.

The CHAIRMAN. We're joined today by Senator Reid of Nevada, a State that has a slight interest in gambling.

Senator Reid, do you have a statement?

STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM NEVADA

Senator REID. Thank you, Mr. Chairman.

I, and my staff, are going to study this issue and make sure we understand it, but from what I understand now, I think this issue is doom to failure.

As you know, last year there was an amendment offered by Senator Craig to exempt the Coeur D'Alene Tribe from the Internet prohibitions that Senator Kyl and others were advocating. This amendment was overwhelmingly defeated by a vote of 82 to 16, so I don't see much hope for this legislation, and I think rightfully so.

The rapid expansion and development of the Internet has presented Congress with a number of new issues certainly in need of clarification. Whether we should permit gaming on the Internet is a question Congress has already addressed. Senator Kyl of Arizona introduced a bill prohibiting Internet gaming, which passed the Senate last year, and because it was late in the session, it was not taken up in the House. I am confident that the 105th Congress could wrap this bill up and pass it. It's scheduled to be marked up in the Judiciary Committee next week, and will become law by the end of the year, it is hoped by Senator Kyl and others.

I, along with the ranking member of this committee, the vice chairman, Senator Inouye, was involved with the original drafting of the Indian Gaming Regulatory Act. One of the central tenets of

the act was that the tribe should be permitted to undertake gaming activities that non-Indians were permitted and could not undertake these activities that non-Indians were prohibited from undertaking. So it's up to the States to determine what type of gaming activities it wants to permit within its borders.

States need only allow tribes to operate games others can operate, but need not give tribes what others cannot have. By permitting tribes to undertake Internet gaming, we would be heading in the direction of granting tribes the right to undertake gaming activities that everyone else is prohibited from engaging. This is not compatible with IGRA.

It is significant to note that this issue of whether we should permit tribal gaming on the Internet came up last Congress, and this is what I have already spoken about—and that's the Craig amendment to the Kyl bill—which, again, I submit was overwhelmingly defeated.

There is little hope that this has changed between last year and now. I would hope that this hearing is the last we hear on this issue, that the matter is resolved and we need only look to last year's vote to appreciate the level of opposition toward tribal gaming on the Internet. I don't believe Congress should or will head down the path of creating separate treatment for Indians in the area of gaming. The ban set forth in the Kyl bill should also apply to tribes. This is the opinion of our states attorney general and governors. By creating a special exemption for Internet gaming, we're completely undermining the purpose of IGRA. Exemptions such as this are a slippery slope and ultimately would lead to a gutting of the act.

Thank you, Mr. Chairman.

The CHAIRMAN. I thank you, and on that note, we'll begin with our first panel, Montie Deer, chairman of the National Indian Gaming Commission and Kevin DiGregory, deputy assistant attorney general from the Department of Justice.

If you would, go ahead, Montie—and, by the way, for all of the witnesses today, your complete written testimony will be included in the record. If you would abbreviate your comments in accordance with the light system, we would appreciate it.

STATEMENT OF MONTIE DEER, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION, WASHINGTON, DC

Mr. DEER. Thank you, Mr. Chairman, Mr. Vice Chairman and members of the committee. As you know, my name is Montie Deer, and I am the chairman of the National Indian Gaming Commission. I do thank you for giving me the opportunity this morning to testify on S. 692.

The National Indian Gaming Commission defers to the Department of Justice with respect to the desirability and legality of this legislation and its specific provisions. However, if the bill is acted upon, we recommend that you consider the following concerns:

The use of the Internet web sites to offer gaming entertainment is a relatively new activity. The most common scenario is when John Q. Public logs onto his Internet at his home base to place wagers on a gambling web site. However, the use of technology such as computers, satellites and telephone lines to offer games, such as

bingo and progressive slot machines, is an activity that is widespread in Indian country. While the Internet Gaming Bill generally prohibits Internet gambling, the impact of this bill on legal gaming activities taking place in Indian country is significant and substantial.

The Internet Gaming Bill contains a blanket prohibition for gambling on the Internet that exempts several areas from the general prohibition. Section 1085(f)(1), which you can find on page 24 of the bill, would not apply to certain bets or wagers, including bets or wages on (a) intrastate or multi-state lotteries placed on an interactive computer service using a private network; (b) live horse and dog racing placed on closed-loop subscriber service; and, (c) lawful fantasy sport leagues or contests.

However, S. 692 does not provide an exemption for similar linked games, which are currently offered by Indian tribes and are legal under IGRA. There are a variety of games legally operated in Indian country, which utilize this type of technology, including, among others, linked bingo and wide area network slot-machine progressives. If S. 692 was passed without an exemption for Indian tribes, many of the tribes which currently operate these types of games legally, pursuant to valid tribal ordinances and tribal-State compacts, would be in violation of the law. This would be contrary to Congress' intent when it passed the Indian Gaming Regulatory Act, and I strongly urge that S. 692 contain an exemption for gaming activities operated on Indian lands.

Gaming activities on Indian lands must be conducted pursuant to the Indian Gaming Regulatory Act. Class II gaming must be conducted pursuant to a tribal ordinance approved by the chairman, and class II must be conducted pursuant to a tribal ordinance and valid tribal–State compact, which generally provides for a State role in the regulation of class III gaming.

While use of the Internet to conduct certain gaming activities in Indian country is subject to litigation—and I point out the AT&T case in the Coeur D'Alene—we are concerned that legal satellite, computer and telephone communications between and among Indian tribal gaming facilities for purposes of conducting class II and class III gaming are not specifically exempted from the prohibition. I believe that the bill should make clear that such communications are not prohibited.

The NIGC has approved satellite linking arrangements whereby bingo operations are linked via telephone line and satellite so that multiple facilities may participate in the same bingo game for larger prizes. The NIGC believes that such communications were contemplated by Congress when they passed the act, and we are concerned that the proposed legislation would detrimentally impact those communications.

In fact, if you look at S.R. 100–446 of the 2d Session of the 100th Congress, we find as follows:

> The committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games, and the language regarding technology is designed to provide maximum flexibility. In this regard, the committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations, and, thereby, enhance the potential for increasing revenues. For example, linking participant players at various reservations, whether they are in the same or different States, by means of telephone, cable, television and satellite may

be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology.

Thus, in my opinion, it is clear that the Congress intended to allow tribes to use the very technology prohibited in S. 692 for the purpose of increasing player participation. Further, to this end, the NIGC has promulgated regulations, which allow for the use of technology in offering these types of games. Specifically 25 C.F.R. Section 502.3 defines class II gaming as, quote, "bingo or lotto (whether or not electronic, computer or other technologic aids are used.)" Also, under the regulations, electronic, computer or other technologic aid means, and I quote, "a device such as a computer, telephone, cable, television, satellite or bingo blower," and that's found at 25 C.F.R. Section 502.7. Thus, under the regulations, tribes may conduct bingo using the type of technology that S. 692 prohibits.

To be sure, there are many tribes that operate bingo games, which utilize this technology to link the games with those played at other tribal casinos. In addition, there are progressive slot machines conducted pursuant to valid tribal-State compacts which utilize computer and closed-loop technology. The governmental gaming operated by the tribes is markedly similar to that conducted by the State, such as lotteries, and all I have to remind you of is power lotto.

Since S. 692 creates an expressed exemption for State lotteries, a similar exemption should exist for tribal government gaming. If States may operate linked lotteries under S. 692, then it does not seem to be a basis for denying the use of similar technology to tribal governments.

In addition to the technology problems which arise in the bill, Section 1085(c)(2)(C) of S. 692 regarding civil remedies provides that (1) the United States shall have the enforcement authority; and, (2) that the enforcement authority specified in an applicable IGRA tribal–State compact shall be carried out in accordance with that compact. However, this section fails to recognize that Indian tribal governments are the first line of regulation of class II gaming on Indian lands. Under section 2710(b) of IGRA, an Indian tribe may license and regulate class II gaming on Indian lands, provided certain requirements are met. Thus, under the current Federal law, tribes are the principal regulators of class II gaming occurring on Indian lands, and S. 692 should recognize that tribes have the authority to enforce the laws regarding Class II gaming violations occurring on Indian lands.

Finally, 18 U.S.C. section 1304 prohibits broadcast of information concerning lotteries and other games of chance. However, IGRA exempts tribal gaming from this prohibition. Section 1085(b)(1) would prohibit the sending, receiving or inviting of information assisting in the placing of a bet or wager. This broad prohibition under IGRA's exemption of tribes from the lottery provisions of 18 U.S.C. section 1304.

At the very least, S. 692 should not prohibit the communication of gaming information on the Internet, which could be disseminated lawfully in some other medium. I would advise that the Office of Management and Budget has advised me that there is no

objection to my testimony from the standpoint of the Administration's program.

I thank you for the opportunity, and I'm free for questions.

[Prepared statement of Mr. Deer appears in appendix.]

The CHAIRMAN. Thank you.

Mr. DiGregory.

STATEMENT OF KEVIN V. DiGREGORY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. DiGREGORY. Thank you, Mr. Chairman and Mr. Vice Chairman. It's a pleasure to be before this committee once again.

The issues surrounding Internet gambling and Indian gambling are complex and touch upon a variety of complicated legal doctrines, including the doctrine of free speech, the doctrine of federalism and the doctrine of tribal sovereignty.

Despite these complexities, the Department's views are fairly straight-forward. Much of Internet gambling, we believe, is prohibited by existing Federal law. We support efforts to amend Federal gambling statutes to ensure that gambling made possible by new technologies is prohibited, but any law prohibiting Internet gambling should not conflict with the tribes' rights under the Indian Gambling Regulatory Act.

Internet gambling, as you probably know, has proliferated between 1997 and 1999. It is estimated that there has been an increase in gamblers to up to 14.5 million and an increase in revenue to up to $651 million, and the problems with this proliferation are several:

The Internet allows instantaneous and anonymous communications, making it difficult to trace a particular individual or organization. Consequently, the potential for operators of Internet gambling sites to defraud their customers is greater than in traditional casino-style gambling.

Unfettered access to the Internet allows people to gamble at any time and from any place. This is a danger, or potential danger, for compulsive gamblers, and could result in severe consequences financially for individual players, and the Internet also makes it easier for minors to gain access to gambling.

Any legislation that makes gambling activities illegal on the Internet should consider the following three factors:

Activities in the physical world and the Internet should be treated the same way. If activity if prohibited in the physical world and is not prohibited on the Internet, then the Internet would become a safe haven for that criminal activity. On the other hand, it would be hard to explain why conduct previously deemed acceptable in the physical world should suddenly become criminal when it's carried out in cyberspace.

Any effort to distinguish Internet transmissions from other methods of communications is likely to create artificial and unworkable distinctions, and any legislation trying to make gambling activities illegal on the Internet should be technology-neutral.

As you probably know, the Wire Communications Act, 18 U.S.C. 1084, currently prohibits betting or wagering on any sports events or contests, and we believe 1084 applies to the Internet, but 1084

arguably only applies to betting on the Internet that relates to sports events or contests.

The Department has prosecuted, in fact, Internet gambling businesses under the Wire Communications Act. We support expanding the Wire Communications Act to confirm that it applies to real time interactive gambling made possible by the Internet, and we also support amending the Act to ensure that modern technology that does not necessarily fall within the definition of wire communication is included.

The interrelation between the Internet and Indian gaming, which is authorized by the Indian Gaming Regulatory Act, must be examined in any legislation prohibiting Internet gambling. Since the formation of the Union, the United States has recognized Indian tribes as domestic, dependent nations that exercise governmental authority over their members and their territory. Under the lawstanding Federal Indian Self- Determination Policy, the Indian Gaming Regulatory Act was enacted to promote tribal economic development, self-sufficiency and strong tribal governments and to protect Indian tribes and the public from corrupt influences.

The Department is keenly interested in seeing the Indian Gaming Regulatory Act's regulatory system work well because the Department has complementary law enforcement authority under IGRA.

An effective gaming regulatory system, including minimum Federal standards, is essential to protect Indian gaming and the tribal government infrastructure and the economic development intended to it. As you are aware, the Supreme Court in its decision in Seminole Tribe versus Florida has invalidated some of the efficiency—or has invalidated the efficiency of IGRA. The 11th Amendment problems raised by that case will, hopefully, be addressed by Congress through legislation.

The Department is concerned, to sum up, that Senator Kyl's bill, S. 692, is silent on Indian gaming, especially in light of its inclusion of exemptions for parimutuel wagering, State lotteries and fantasy sports leagues and contests, and in light of IGRA's allowance of some electronic coordination between gaming facilities where that gaming is conducted entirely on Indian lands. But we believe that when tribes seek to offer gaming to citizens of various States where such gaming does not take place solely on Indian lands and is not authorized under State law, there would be no compelling reason to exempt Indian tribes from any legislation prohibiting Internet gambling.

I thank you for the opportunity to present these remarks, and, I, too, am available for questions, and, hopefully, will be able to answer those questions, and, if not, will certainly be able to get back to you or find the right people who can.

Thank you.

[Prepared statement of Mr. DiGregory appears in appendix.]

The CHAIRMAN. Thank you.

Let me start with you, Chairman Deer. How many tribes use intertribal links to operate games on Indian reservations, such as linked bingo or progressive slot machines?

Mr. DEER. It's my understanding, Senator, that there's currently 60 some tribes that do bingo, and I'm still trying to run down how

many are using progressive slots, and I will supplement my answer to you as soon as I discover that.

The CHAIRMAN. All right, but your commission does — you've approved agreements, which govern these kinds of games. Is that correct?

Mr. DEER. That's correct.

The CHAIRMAN. And does that agreement—do they provide a sufficient basis to regulate them?

Mr. DEER. I think it does, yes, sir.

The CHAIRMAN. Kevin, is it the Department's position that tribes should be treated equally with other industry segments, such as State lotteries, live horse racing, dog racing and so on?

Mr. DIGREGORY. We think that any legislation addressing Internet gambling should consider the rights and privileges that are given to the tribes, pursuant to the Indian Gaming Regulatory Act.

The CHAIRMAN. And does the Department support this bill, as it relates to the enforcement of violations of the provisions?

Mr. DIGREGORY. I'm sorry, support the Kyl bill?

The CHAIRMAN. Well, at least the enforcement position of the Kyl bill.

Mr. DIGREGORY. Well, with respect to the Kyl bill itself, we believe that there are better ways to deal with the Internet gambling problem, and I alluded to them in my testimony. We believe that amendments to the Wire Communications Act, to ensure that the Wire Communications Act covers all forms of wireless and satellite communications and amendments to the Wire Communications Act to ensure that the Wire Communications Act covers betting other than sports betting, would be fairly sufficient in light of the current Wire Communications Act and in light of other Federal gaming statutes to enable the Federal Government to effectively enforce against Internet gambling.

The CHAIRMAN. Senator Inouye, do you have any questions?

Senator INOUYE. Yes; if I may ask Chairman Deer, this measure, S. 692, prohibits the lawful use of Internet by tribes for class II gaming but exempts State-sanctioned use of the Internet for dog racing, horse racing and fantasy sports.

Can you offer any good reason why existing lawful use of the Internet by tribes for gaming under IGRA should be banned? Is there any reason?

Mr. DEER. Not that I'm aware of. Of course, you understand that there is class II, which we call electronic aids, and then there's class III, which are electronic facsimiles, and, of course, the class III is governed by tribal-State compact. So I think it's covered already. I mean, I don't think we need to change.

Senator INOUYE. If this bill, S. 692, is enacted into law, how would you go about enforcing this act?

Mr. DEER. Well, I think by the very nature, the bill is—it's going to be hard for any law enforcement to enforce it because of the very nature of the privacy of the home, and how do you know where it's coming from et cetera, et cetera.

So I think it's going to be very difficult to enforce, the way it's written, whether it's Justice, the U.S. attorneys or my office.

Senator INOUYE. And in response to the Chairman—you said that you don't know how many gaming operations would be affected?

Mr. DEER. I know that there's 60 tribes having linked bingo. I am not aware yet of how many have progressive slots, but I'm working on that and I will supplement my answer.

Senator INOUYE. If Congress would adopt a prohibition on Internet gaming, as proposed in S. 692, what do you think would be the best reasons for Congress to exempt Indian gaming from such prohibitions?

Mr. DEER. The very act, and the very reasons that were given in the committee back in the 100th Congress. This is—from my way of thinking, the Act itself was a compromise after *Cabazon,* but I think that is the power of the sovereigns to do that.

Senator INOUYE. What is the status of the *Coeur D'Alene* case?

Mr. DEER. It's my understanding that it's on appeal.

You know, it first started in tribal court and then the State Judge—I believe it was Judge Lodge—reversed the tribal court and I think Judge Lodge's Opinion, and that decision has been appealed by the tribe.

Senator INOUYE. If I may ask Mr. DiGregory, if S. 692 were to be enacted into law as written and bar tribes from using the Internet, what effect would that bar have on Indian country, in your opinion?

Mr. DIGREGORY. I think that's a difficult question to answer only because, as a prosecutor, I would like to understand the facts of a particular gaming operation before I decided whether or not a particular prohibition applied to that gaming operation.

I can tell you this, Senator—I am here sort of to raise the red flag that there is potential for difficulty in the Kyl bill with respect to the Indian Gaming Regulatory Act and gaming that is conducted on Indian lands. We are concerned about that, and we are concerned about the potential, as I said, for difficulty and for conflict between the statutes.

Senator INOUYE. What sort of difficulties?

Mr. DIGREGORY. Well, as I indicated earlier in my testimony, there may be certain kinds of electronically coordinated gaming, for lack of a better way of putting it, that occurs on Indian lands that might come under criminal scrutiny as a result of the Kyl bill.

Again, without knowing specifics, it would be difficult for me to give you, and we are reluctant at the Department, ever to say that something is illegal or not illegal until a case or controversy is brought before us. But we can envision where there may be such difficulties, as it relates to current gaming being conducted in Indian country, which the National Indian Gaming Commission has passed upon.

Senator INOUYE. Do you believe that this committee should propose an amendment to the Kyl bill that preserves the rights of tribes under IGRA?

Mr. DIGREGORY. I don't know exactly how you would craft that, but I certainly think that you would be able to work with—well, I would hope that you would be able to work with Senator Kyl and the sponsors of the bill and the members of the Judiciary Committee to craft some language, which would ensure the integrity of the

Indian Gaming Regulatory Act and the delicate balance between tribal and State interest, which it permits.

Senator INOUYE. The Department of Justice has a lot of legal experts. You cannot tell us how it should be done?

Mr. DIGREGORY. We would be glad to work with you on that, Senator, and, if I might, Senator, in relation to a question that you asked earlier of Mr. Deer, I just want to point out that the AT&T *Coeur D'Alene* case is a case which arose as a result of 13 attorneys general, I believe, using a provision currently in the Federal law—that's 1084. They used 1084 to go to AT&T to ask AT&T to either fail to provide or discontinue service to the Coeur D'Alene because they believed that the Coeur D'Alene were going to use telephone lines to transmit bets and wagers. So that case arose as a result of a Federal statute currently on the books, and, as I said earlier, we believe that amendments to that statute would enable us to effectively deal with all forms of Internet gambling, so long as those amendments covered other than sports betting.

Senator INOUYE. If we're not successful in working with Senator Kyl to come up with amendment to protect the rights of tribes, do you believe that there should be another amendment proposed that would ban only certain types of games, and, if so, what games should be exempted?

Mr. DIGREGORY. I'm not sure what games should be exempted, and I guess that's because we are concerned particularly about the exemptions in this bill for parimutuels and for fantasy sports leagues. I mean, any time there are exemptions, you have to be concerned, especially when you're dealing with a technology like the Internet that the exemptions could swallow the prohibition.

Senator INOUYE. If they exempt parimutuel, should the Indian tribes also be accorded that privilege?

Mr. DIGREGORY. I think that whatever exemptions are considered by the Judiciary Committee, they should be considered in relation to the rights and privileges that the tribes have under the Indian Gaming Regulatory Act. So it would be difficult to consider, I think, exemptions for the parimutuel industry and not consider exemptions, perhaps narrowly tailored exemptions, for the tribes, and I point out that this is an exemption that deals specifically with a specific kind of gaming. I don't want to get into a lengthy discussion about scope of gaming issues because those are always so difficult, but the exemption that is in the bill for parimutuels is very specifically tailored to that specific kind of gaming.

Senator INOUYE. Would it be fair to say that the position of your Department is that S. 692 does not adequately consider the rights of Indian tribes under IGRA?

Mr. DIGREGORY. I think it's fair to say that that's correct.

Senator INOUYE. Thank you very much, sir.

The CHAIRMAN. And the committee thanks you both for appearing.

The next committee will be Richard Williams, chairman of the Lac Vieux Desert Band of Chippewa Indians; Ernest Stensgar, chairman of Coeur D'Alene Tribal Council; Richard Hill, chairman, National Indian Gaming Association from Washington.

As with the other panel, your complete testimony will be included in the record, and we would ask that you abbreviate your comments.

We'll start with Mr. Williams.

STATEMENT OF RICHARD WILLIAMS, CHAIRMAN, LAC VIEUX DESERT BAND OF CHIPPEWA INDIANS, WATERSMEET, MI

Mr. WILLIAMS. Good morning, my name is Richard Williams, and I am the elected chairman of the Lac Vieux Desert Band of Lake Superior Chippewa Indians.

Thank you, Senator Campbell, and committee members for the opportunity to provide you with information about our Class II Internet bingo gaming.

As you know, the Kyl bill, which is intended to prohibit Internet gaming, is steadily progressing through the Senate process and no hearings have been held on the effects of this on Indian nations. As I will demonstrate, the bill amends the Indian Gaming Regulatory Act in a harmful manner, and will discard the balance between tribes and States that IGRA was designed to protect.

For my tribe, in particular, the effects of the Kyl bill, as it is currently drafted, would bankrupt my tribe and devastate my people. My tribe has invested millions of dollars and countless hours in developing class II bingo games that utilizes Internet technology to expand its participation level. As you know, my tribe, like most tribes around the United States, does not have the economic viability to just throw away such large amounts of money into developing a class II game haphazardly. Instead, we developed this game because you encouraged us to do it. You asked the Indian Gaming Regulatory Act in its legislative history and encouraged this tribe to expand its class II bingo participation levels by using the latest technology and telecommunications, such as the Internet.

In making this statement, I will divide my testimony into three areas: First, I will discuss how the Indian Gaming Regulatory Act treats class II bingo differently from other types of gaming; second, I will demonstrate to you how our class II game is entirely played on the reservation, and, therefore, legal under the Indian Gaming Regulatory Act; and, finally, if you disagree with my legal analysis, I will discuss why class II bingo should be given an exception from a Congressional policy perspective.

Class II Bingo and The Indian Gaming Regulatory Act: First, while IGRA anticipates that tribal gaming occurs on Indian lands, it does not require that players be physically located on Indian lands. Class II bingo conducted with the use of the Internet occurs entirely on Indian lands. Specifically, all three elements of gaming—consideration, change and prize—occur on the reservation.

IGRA specifically authorizes the use of electronic, computer and other technologic aids in conjunction with bingo. In its legislative history, IGRA encourages tribes to expand bingo audiences with the use of the latest technology and telecommunications, such as the Internet. IGRA further provides a specific exemption from the anti-lottery status. Finally, IGRA provides that the player need not even participate directly in the game, but rather a holder, such acts as the player's agent, play bingo for the player.

The National Indian Gaming Commission has ruled that the holder can play class II bingo for a player, so long as the player performs the functions of the player and is located on Indian lands. U.S. courts have also held that the class II bingo games that utilize technological holders to play bingo on behalf of a player is intended, and, therefore, legal under the terms and conditions of IGRA.

How The Bingo Game Is Played Legally: The language designed and object of IGRA provides the unique ability for a tribe to expand its class II bingo participation with the assistance of the Internet. In order to explain how all of the elements of Internet bingo can occur on Indian lands, a brief example of how our Internet bingo operates is warranted.

First, players access the tribes' class II bingo web site by entering the tribes' access on the Internet browser and establishing an account. When the player establishes an account to play class II bingo, the player provides the holder, physically located on the reservation, with his or her preferences for playing bingo, such as how many bingo cards to purchase and what games to play.

The holder on the reservation then acts as the player's agent and purchases bingo cards, selects games to play and marks the bingo cards. The Internet bingo game is conducted live by the tribe in accordance with the standards and qualifications of a class II device, as defined by IGRA. The numbers are pulled from a standard bingo ball blower and announced by a caller.

Thus, the holder allows the player to participate in the game without the player actually purchasing the bingo cards, making strategic decisions or marking the bingo cards. Thus, the elements of consideration, chance and prize all occur entirely on Indian lands and in complete conformance with IGRA.

Even if you do not agree completely with the legal analysis set forth above, I appeal to you to view our bingo games from a policy standpoint:

The Kyl bill is essentially creating two groups: first, gaming groups that are prohibited, such as off-shore gaming companies, and gaming groups that are granted exceptions, such as horse and dog parimutuel wagering, State lotteries and authorized State gaming. Once you step back and look at the similarities of these respective groups, I do not believe that Congress intends to prohibit class II bingo. For example, the gaming groups that are prohibited, such as off-shore gaming companies, have certain common characteristics. First, they are unregulated or regulated off-shore under questionable jurisdictions, such as Antigua; second, they have questionable policies, such as accepting bets from any person; third, the companies have poor reputations for paying customers for legitimate winnings; fourth, because the companies are off-shore and the U.S. cannot protect consumers from fraudulent company practices; fifth, the games also consist of class III games, such as slot machines, video poker and video blackjack, therefore, appealing to any problem gamblers; finally, because the companies are unregulated, there is no way to measure the integrity or the results of the game.

On the other hand, the gaming groups that are given exceptions by the Kyl bill, such as horse racing, fantasy sports league and State lotteries, also have common characteristics. First and fore-

most, the Federal Government regulates gaming, ensuring the integrity of the game, protecting the consumer from unscrupulous operators and guaranteeing payment; second, the gaming is parimutuel in nature—meaning that the players can play against each other, trying to win a money pool rather than against a machine; third, the gaming is conducted live whereby players may witness the results; fourth, the gaming requires skill, thereby deterring problem gamblers——

The CHAIRMAN. Mr. Williams, you'll need to wrap up your testimony.

Mr. WILLIAMS. You see that the two groups have identified policy reasons for placing gaming in each two groups. I ask you one simple question: Which group does the Indian class II—tribal class II bingo belong? Like gaming interests given exceptions in the Kyl bill, class II bingo is regulated by the Federal Government ensuring it's integrity, like horse racing is parimutuel betting. Players do not play against a machine, but rather against others in a live setting, and bingo requires skill in order to win the game. The game is not class III gaming.

As demonstrated, Congress contemplated the use of technological aids that links participating individuals to play bingo from remote locations in order to increase player participation for tribes in it's clear use of telecommunications devices.

I have a few more—well, actually, another page and a half.

The CHAIRMAN. Well, turn all that in because we'll go over it—every word that's written is studied carefully by the committee. We just have time limits so we simply can't allow people to just keep on talking.

Mr. WILLIAMS. I understand. Because my testimony is legally complex, I have attached a detailed legal analysis of everything that I have presented today. I would encourage you and legislative counsel to review this legal analysis before coming to any conclusion about prohibiting class II gaming.

Finally, I have attached an amendment that is very limited in scope. The amendment, basically, provides for a class II bingo exception to the Kyl bill. This means Indian tribes would be extremely limited in games that conduct Internet technology; for example, tribes could not offer any class III or sports wagering over the Internet under this exception.

It, basically, only allows for what Congress intended in the actual language of IGRA.

Once again, I thank you for inviting me to testify, and I am willing to answer any questions you have in regard to our tribes' Class II bingo game and our ultimate future and welfare.

[Prepared statement of Mr. Williams appears in appendix.]

The CHAIRMAN. Chairman Stensgar.

STATEMENT OF ERNEST STENSGAR, CHAIRMAN, COEUR D'ALENE TRIBAL COUNCIL, PLUMMER, ID

Mr. STENSGAR. Good morning, Senator Campbell and Senator Inouye. I bring you greetings from the Coeur D'Alene Tribe from the Northwest.

We provided you with testimony and we would like to have that included in the record.

The CHAIRMAN. All of that will be included—your written testimony will be included in the record.

Mr. STENSGAR. Mr. Chairman, we're the infamous Coeur D'Alene Tribe——

The CHAIRMAN. We might mention that there are people who are testifying who haven't appeared before this committee before. We're really interested in hearing your thoughts on things. You don't need to bring a book of information and just read to us—all of that is going to be read anyway. We would like——

Mr. STENSGAR. I wasn't planning on reading, Mr. Chairman.

The CHAIRMAN. Okay, go ahead.

Mr. STENSGAR. Mr. Chairman, we're the infamous Coeur D'Alene Tribe who began the national Indian lottery. I think you had some questions of where that was. I'm not going to go through the history of the lottery on the Coeur D'Alene Indian Reservation. I want to speak in opposition to the Kyl Bill. I think that—just bringing it to the quick, as a tribal leader representing my people and striving for self-sufficiency, using technology, using every means available that's legal, we wonder about the fairness of legislation that's presented to Indian country. When legislation is presented for Indians, about Indians, that affect Indians, it just seems proper that we ought to be consulted, that testimony ought to be taken, that clear thoughtfulness should be given to Indian tribes.

It is no secret in Indian country that States and Indian tribes are on opposite sides since reservations were created, and States came in afterward. There has been opposition when we look through the history of legislation, when we look through the history of tribal–State relations and we see that.

Our alternative has been to find champions in Congress, people that we were able to convey the plight of Indian people and we sit here today doing just that. We have seen games conducted that by States that are intrastate. We see shopping over the Internet, we see games that are conducted—off-track betting, et cetera, that are being conducted, and as we attempt to do it, it's deemed wrong.

As an Indian nation, I just wonder why. As I read the Kyl bill and I read through it, and as I have our legal people look through it and all our technical people, we see all the exemptions, and I have to ask you where is the fairness?

I think our people have stood and represented themselves in this country for hundreds of years. Prior to European contact we defended this area, and I think in the 1920's as we became citizens, and I think that Congress dealt with us and looked at Indian tribes and said, "You're an equal now. If we have problems, we'll deal with them by law." It hasn't happened.

The Coeur D"Alene Tribe, along with the other tribes, wonder what's next in the gaming area. As we—since the National Indian Gaming Regulatory Act has been established tribes have conducted gaming operations, and almost every year we sit before the Indian Affairs Committee or some other committee explaining what we're doing in Indian country in the realm of gaming, and we say over and over what we're doing and the goals that we're trying to get to. And over and over again it seems like opposition is finding ways to combat that.

The latest Commission report that came out—it isn't a secret to us who that Commission threatens. We just read it.

Senators I sit before you presenting this testimony asking you not to consider the Kyl bill, to maybe study it more, to look at what the tribes are doing, to see who it's attacking, and I can't be any more blunter than that. I don't claim to be an attorney—I'm just a tribal chairman living on an Indian reservation trying to survive in today's world. I sit here respectfully and await your questions.

Thank you.

[Prepared statement of Mr. Stensgar appears in appendix.]

The CHAIRMAN. I think Senator Inouye and I have always shared the same concept in that whatever is allowable to States ought to be allowable to tribes too.

Rick, why don't you go ahead and proceed?

STATEMENT OF RICK HILL, CHAIRMAN, NATIONAL INDIAN GAMING ASSOCIATION, WASHINGTON, DC

Mr. HILL. Good morning, Mr. Chairman, and Senator Inouye. Thank you for this opportunity to be heard this morning. Since the Kyl bill was going on we never had an opportunity like this one this morning, so we really appreciate your calling this hearing.

First of all, I want to say that the commerce opportunities for Indian nations is extraordinary. The opportunities for our nations who live in rural locations to get this type of opportunity is unprecedented and the opportunity exist and the access to markets that were never known to us before exist for us through IGRA and through the technology.

Second, the short-term—it goes beyond the short-term gain of what we're talking about here in terms of tribes developing infrastructure, developing individual skills for individual members beyond what gaming would do for the members of our various nations, in terms of jobs that are created and jobs to be web masters, to be computer experts, to be programmers, to be engineers and things like that are very helpful in a lot of varied areas in our communities.

The impact that this would have would be pretty devastating to what presently exist in the field as we know it today. The Kyl bill—the Internet Prohibition Act really is a prohibition against Indians; basically, that's what it is and that's what it's doing because it would really gut the Mega-mania opportunities that 60 tribes are engaged in and would probably really put a hit on the financial position of these nations engaged in the mega-bingo, as well as the Coeur-d-mania, and, basically, would not be in the spirit of what IGRA is all about, which is to improve the quality of life of our governments, and their people and the communities.

I think that—I would like to mention that even the national country—with respect to what the Chairman said about the national gambling impact, they acknowledge the impact that technology-assisted games have on tribal economic development. So I would like to at least compliment them in that area, although we haven't agreed with them to a large extent.

One specific problem with the wording of the Kyl legislation is that it does not recognize the inherent differences between class II wagering, which can't take place without a compact, and class III

casino-style games that require an agreement between tribes and States. This error opens up the door for the imposition of new requirements for class II gaming, as well as allowing State Attorney Generals to enforce State laws on Indian reservations, and I think that's really contrary to what this committee has been striving for and has maintained over the course of the years, which is to maintain our inherent rights and protection of our governance. So it's important that the record reflect that, that the Kyl bill does not take that into any consideration.

Current law is really sufficient enough to deal with these particular issues. I think Congress back in 1988 when we had the debate including the word "technology" in the Indian Gaming Regulatory Act was most appropriate. No one really knew how far that would be advanced, but I think the opportunity that exist today is really a good opportunity for our nations, and I just want to refer to the committee report on IGRA that explains, and I quote,

The committee specifically rejects any inference that tribes should restrict class II games to existing games' sizes, levels of participation or current technology. The committee intends that tribes be given every opportunity to take advantage of modern methods of conducting class II games, and that the language regarding technology is designed to provide maximum flexibility.

And I think that's where we are today—that we should have this type of flexibility as we proceed into the future.

For all practical purposes, S. 692 would amend IGRA and eliminate the technological provisions that have been in use without major incident for nearly a decade. Once again, the National Gambling Impact Study is going to recommend to Congress.

The committee recommends that Congress should adopt no laws altering the rights of tribes to use existing telephone technology to link bingo games between Indian reservations when such forms of technology are used in conjunction with the playing of class II bingo games, as defined under the Indian Gaming Regulatory Act.

Equally troubling within IGRA is it expands for some and not for all, and I think some of the Chairmen here spoke about fairness. Our bottomline is that with our unique relationship between the tribal, the Federal and the State Governments, tribes should be granted the same opportunities—no more and no less—as the State gaming operators, and, certainly, private sector for-profit entities.

S. 692 overrules State and tribal governments, and we have the Coeur D'Alene situation here where they have this compact negotiated with the State Government, and we think that that's appropriate. We don't know why the Federal Government would want to step in that area, and for once I would agree with Senator Reid where States' rights really come into play in this Congress here where the States' rights should be acknowledged. The negotiations that exist between the States and their Indian nations relative to IGRA should be maintained absolutely. I don't think it should be anything different.

I would like to talk about the regulation a little bit. This is unlike these phantom operators who are located off-shore. Tribal gaming has a fixed location that enables regulators to ensure that games are fair, consumers are protected, minors are screened out and problem gamblers are offered assistance. NIGA, the National Indian Gaming Association, took upon themselves to amend our mix that we provided in previous testimony that we were going to amend our minimum internal control standards to include an

Internet, and I would like to include that in our testimony. It's being redrafted as we speak by the appropriate people, and we will get that to you in the next couple of weeks.

Our mix requires that players be of legal age, to provide a valid social security number for purposes of reporting the gambling winnings, as well as subsequent testing of the games is maintained by the Indian Gaming Commission, as well as the National Indian Gaming Commission. Tribes also establish a satisfactory customer dispute resolution mechanism, as well.

I would like to just present the Australian model where they've chosen to look at land-based casinos where they are licensed and regulated, and I think that the Australian model isn't any different than what the Indian nations are doing presently. We have a fixed land-based operation where it's regulated and monitored not only by their own governments, but by the Federal Government. We're not phantoms that can change a location with a push of a button or a wink of an eye. We're there, we're legitimate. I think that tribes know that they're engaged in these opportunities that we would only be shooting ourselves in our own foot if we don't have the complete integrity of our games, so that's why the notion that we've been under this microscope for over 10 years now—that's why tribes take and go the extra mile to guarantee to their customers and for themselves that the integrity be the first and foremost thing that would be protected. Otherwise, we wouldn't have any customers, and so I think that in terms of an example, the Australian parallel to what Indian nations are doing is quite similar—that we have a fixed, physical location that can be regulated and monitored and licensed. So I think that's very important.

The CHAIRMAN. Perhaps you can wind down so that we can ask some questions.

Mr. HILL. I have two other final comments, and I would like to say that our bottomline here is that we should be granted the same opportunities that every other part of the industry has, and it's sad to think that the Kyl bill does not reflect that opportunity, and it's really—it's been said over and over again this morning that it's just not fair that we don't have a similar opportunity.

If read back in the record it looks like Congress noted about the poverty in Indian country over 200 years when they passed the Indian Gaming Regulatory Act, and I think it was also noted that the tribes should have some kind of competitive edge in this particular industry, and I think that's one of the basic fundamental things of IGRA that's been lost over time. Recently we've been hearing the slogans of equal playing field.

The CHAIRMAN. We're aware of that.

Mr. HILL. Well, that's kind of a slogan that the States invented because it shouldn't have been an equal playing field because we never had any economic development in our communities, and that's what Congress saw back in 1988—that we would be recognized through our governance that we have this right and then in place was the compacting procedures that was noted for protection of our sovereignty and to negotiate something that's fair. We can see completely today that the tables are being shifted, advantages are being given to the greater part of the industry, and they're trying to eliminate some of the success that we've had.

The CHAIRMAN. This committee above any committee in this United States Government is fully aware of what's happened to American Indians, believe me, and we take no exception with your statement about that either.

We want to ask you some questions.

Mr. HILL. Thank you, Mr. Chairman.

[Prepared statement of Mr. Hill appears in appendix.]

The CHAIRMAN. This question of proxy players interest me. You are familiar with that somewhat?

Mr. HILL. Yes.

The CHAIRMAN. I'll ask you and Mr. Williams to. It seems like it's kind of complicated to me. For instance, Hawaii and Utah have no gaming. I just asked Senator Inouye 1 minute ago about gaming in Hawaii, and he said they don't even allow social poker among friends.

How would a person—or would they be allowed under this so-called proxy player? Would they have to be on another reservation or could a proxy player be anywhere and use a person that's on a reservation as a proxy?

Mr. HILL. You're asking me?

The CHAIRMAN. I'm asking you and Mr. Williams, both.

Mr. HILL. I would just say, again, we should be afforded the same opportunities any other part of the industry has in that regard in terms of proxy player or whatever, but I think from some of the literature that I've read it seems to me that the folks in Hawaii or Utah can have access to thousands of games, as we speak——

The CHAIRMAN. I don't know if we're aware whether a person in Utah or Hawaii has—maybe Senator Inouye can tell me if a person in Hawaii can play the lottery in Colorado. Does he violate a Hawaii law if he does that?

Senator INOUYE. Not that I'm aware of.

The CHAIRMAN. Well, the question of enforcement came up. If a game is played on a reservation within the State that allows a person who is the proxy player is in a State that doesn't allow it, I wonder which one is the location where the game is being played, where the guy is playing it or the location of the person that's calling the cards?

Mr. HILL. I could be corrected on this, but it seems to me through some regulation scheme that codes could be adopted where you would restrict certain calls or restrict certain people on applications when they apply to participate in a game. They have to identify their social security number, and where their residence is to see if they're eligible to even participate in the game to be screened out. So I think in the screening process you can identify specific folks and specific locations to be participatory in a particular game.

The CHAIRMAN. Yes; there would have to be some kind of alarmic, electronic immediate kind of a response.

Mr. HILL. We would like to prepare a more comprehensive answer in writing for you as well.

The CHAIRMAN. I would be interested in that, and I'm sure the other committee members would be too.

There are some tribes who operate class III games linked with other tribes who operate the same class III games to provide pro-

gressive jackpots. Is this accomplished with the agreements of the States involved?

Mr. HILL. I think you have to be part of an agreement to do this progressively with the casino-style type game. I think it has to be part of a compact.

The CHAIRMAN. It is part of a compact, okay.

Are we correct in assuming your testimony states, basically, that live dog racing is not currently authorized to conduct interstate wagering, but would be allowed under the provisions of S. 692?

Mr. HILL. That's how we read the Kyl bill. Some things that are prohibited would be extended to be declared legal under the Kyl bill, in terms of the use of the Internet.

The CHAIRMAN. And that includes dog racing?

Mr. HILL. Yes.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Williams, does your tribe operate gaming activities that are linked to games machines on other reservations?

Mr. WILLIAMS. Yes; we do.

The CHAIRMAN. And can a person make a bet on those machines from their homes on other reservations?

Mr. WILLIAMS. No; they can't.

The CHAIRMAN. They would have to go to some central location, like a casino, on their reservations?

Mr. WILLIAMS. They have to be at another Indian facility.

I think we're talking about progressive slots. That is the only devise that is linked—I think the Quartermania and so forth.

The CHAIRMAN. Chairman Stensgar, does your tribe, the Coeur D'Alenes, have an agreement with other States, other than Idaho, to operate the National Indian Gaming Lottery in those States?

Mr. WILLIAMS. They do not have.

The CHAIRMAN. Do you have any other types of gaming that use different technologies to link to other facilities on other reservations, such as bingo or progressive slots?

Mr. WILLIAMS. Mr. Chairman, we used to but we discontinued it.

The CHAIRMAN. Why?

Mr. WILLIAMS. It wasn't profitable.

The CHAIRMAN. Do you have any international customers who did or now purchase tickets from the National Indian Lottery?

Mr. WILLIAMS. I don't know. I'm not directly involved in the game. I don't know where the customers were coming from. I can't answer that, but I can give you the answer later.

The CHAIRMAN. Yes, all right, thank you.

Senator Inouye.

Senator INOUYE. Thank you.

On June 21, the National Gaming Impact Study Commission will issue a report. Isn't that true, Mr. Hill.

Mr. HILL. I think they're going to issue the report on June 18th.

Senator INOUYE. But it will be released publicly, I think, on June 21?

Mr. HILL. Yes, sir; as far as I understand, around that timeframe.

Senator INOUYE. I would like to ask Mr. Williams and Mr. Stensgar about one of the recommendations that we understand the Commission will be making:

The Commission recommends that Congress should adopt no law alerting the right of tribes to use existing telephone technology to link bingo games between Indian reservations when such forms of technology are used in conjunction with the playing of class II bingo games, as defined under the Indian Gaming Regulatory Act.

Do you support that recommendation, Mr. Williams?

Mr. WILLIAMS. I support it to the extent that it preserves the right that IGRA has provided for us, but we would like to take that one step further and utilize the Internet service.

Senator INOUYE. Mr. Stensgar?

Mr. STENSGAR. Senator Inouye, you're asking me if I agree, and if this relates to a class II, if it was lottery, yes, I would support that.

Senator INOUYE. This relates to class II. What if it bars lottery? Would you still support it?

Mr. STENSGAR. If it bars lottery? Not if it bars lottery. We have a compact with the State of Idaho that's supported by the Governor and by the legislature. We worked very hard on that compact, and under IGRA we deem that compact to be legal and we're operating legally. I think that as we look at these games that are already in progress, that ought to be taken into consideration.

Senator INOUYE. Believe me, I'm on your side.

If the Kyl bill becomes law, would it affect just Idaho, the operation in Idaho, or would it affect all operations?

Mr. STENSGAR. Pertaining to the Coeur D'Alene Tribe, we only operate in the State of Idaho.

Senator INOUYE. So do you think it would be barred in Idaho?

Mr. STENSGAR. If the Kyl bill became law, it would stop the Coeur D'Alene Indians operation, as we now know it.

The CHAIRMAN. In fact, I think the intent of the bill is that it would affect all.

Senator INOUYE. Well, I still stand by the intent of the law as we drafted it, and I go along with my chairman here, that IGRA protected the rights of tribes to carry on the activities in class II using the latest technology. There may be some technology of which we are not aware of at this stage, but I think the law is flexible enough to take that into consideration.

Tomorrow I believe the Judiciary Committee will be holding a business meeting to considered this measure, and I hope that you will be in touch with the members of the Judiciary Committee. They will play a crucial role in this, and we will do our utmost to make certain that members of that committee are aware of our thoughts. We will share with them our experiences in this area. Hopefully, our views will prevail, but, at this stage, I have no way of knowing, but we will do our best.

The CHAIRMAN. And I concur with Senator Inouye.

Rick, you've been around here a long time testifying, and you know that nothing ever stays the same. We keep revisiting areas dealing with Indian sovereignty and Indian rights all the time, and, as times change and members change, and new technologies change and so on, things keep resurfacing that we thought we had fixed and we have to revisit it. Then we also have, as you know too, a constant erosion of Indian rights. That's been going on forever and it's something that you just have to be back here dealing with all the time and that we try and deal with, and protect tribes as much as we can too.

Mr. HILL. We appreciate it, Mr. Hill, and Senator Inouye—your standing strong for us in the past, and today you're standing strong as ever for us, and we really appreciate your guidance and your strength in these areas.

The CHAIRMAN. We'll do our best and thank you for appearing.

The last panel will be just Frank Miller, former chairman of the Washington State Gaming Commission from Seattle.

You may proceed at your leisure, Frank. Your complete written testimony will be included in the record.

STATEMENT OF FRANK MILLER, FORMER CHAIRMAN, WASHINGTON STATE GAMING COMMISSION, SEATTLE, WA

Mr. MILLER. My name is Frank Miller. I'm the former director of the Washington State Gambling Commission. I'm now an attorney in private practice. I've been in that capacity for 18 months, so I left Government and am now on the other side, so to speak.

During my tenure of 13 years with the State of Washington as Deputy Director, Chief Counsel, and, finally, Director for seven years, I had the pleasure of negotiating 19 tribal—State compacts on behalf of the State. I was lead negotiator and under law required to negotiate them.

Also, the challenge of negotiating 19 tribal-State compacts was a challenging time in my career, and I think I left with a sense of accomplishment and pride because what we built in Washington State was a true partnership between the tribes and the States under IGRA. IGRA did work—it does work, if it's given a chance to work, and I just want to make that point clear today.

I've been asked here today to testify on the impact of the Kyl bill, and for the last 2 years I've been involved in numerous areas, including the bingo games that you've talked about today and I'll briefly touch on those.

With some tribal governments, I am also involved in Internet gaming—not on-shore, off-shore and I can tell you from experience it is real. There are governments looking to regulate it; there are governments looking to get money out of this activity; it opens up opportunities to these governments that are off-shore.

Briefly, I want to talk about three issues today:

First, tribal gaming, as we know it, and technology. I do believe that this bill, if adopted, as written, will greatly impact I think IGRA and its effect on class II gaming. Once again, back on the negotiating table we really I think tried to protect the difference between class III and class II whose States' perspective and my perspective—we always knew class II was truly under the tribes. That was their sovereign issue, that was their right to regulate with Federal oversight. We did not want to be a part of that arena.

Under this particular bill there is no doubt in my mind—I'll touch upon that—that that is clearly, or at least possibly, will be eroded in the area of electronic bingo games.

In Washington State, for example, we have 12 to 13 tribal-State casinos right now in Western Washington with class III compacts because slot machines were not authorized initially, and they still are not. We cannot negotiate slot machines because they are not authorized under State law. Class II was also paramount in these operations.

Many of the tribal casinos in Western Washington were in rural areas. They didn't have the population base, so with the two or three tribes that are making tremendous amounts of money with their table games, for those that were 100 miles away the opportunity wasn't there, so the ability to link up with other tribes around the country, within the State, playing these class II bingo games was paramount in at least achieving some revenues. It's very, very important. There are other tribes around the country that also rely greatly on class II gaming, and we can't miss that point.

Under the Kyl bill, under this new proposal, it's clear that those companies—and I work with one, Multimedia Games, who develops satellite bingo, who invited Mega Bingo, which is a speed bingo game—not just bingo as we know it—but a speed bingo game that links all players around the country playing for a quick jackpot, and the new Evergreen Bingo, which is even faster but still bingo—under the Kyl bill it's clear that those technologies could be in jeopardy, the technologies that were granted under IGRA to be not maintained as of 1988 but to grow over the years could be in fact in jeopardy because the bill, at least as I read it, if adopted, would require that these types of services now require tribal-State compact; arguably, a tribal-State compact to go forward.

Now, let me give you a quick example of how this could be very, very complicated. We had a bill this year in Washington State to all the charities to conduct electronic bingo, the same games that I'm talking about—Mega Bingo, Rocket Bingo, these types of games. The bill failed in Washington State. Therefore, it's not authorized in Washington State. If a compact is required to conduct these types of class II games, if that is now—because they're using Internet, they're using technology and telecommunications—and the bill now that failed in Washington State, what does that do to negotiations? Is it automatically class II or is it eroded?

It clearly is eroded. It clearly has the effect of amending IRGA without an open debate on that issue, so I really think I would express some caution and some real concern in that arena.

Senator Inouye asked is there a simple solution or what is the solution? There is one simple solution—and not the only solution—and that is to exempt class II gaming, as authorized under IGRA. I mean, there is your authorization; there are your protections, and also class III gaming, as negotiated between a tribe and a State, subject to a tribal-State compact. It seems to me the Federal Government really should not be getting involved in that arena, and by prohibiting Internet gaming that's exactly what would be happening.

The final issue I want to talk about is the issue of the Kyl bill itself, and I've gone on record and I guess have been somewhat outspoken as one of the former regulators in the country as saying you can't put your head in the sand. This is real, it is happening, any Federal legislation should be geared toward consumer protection and not necessarily just prohibition. I do not believe prohibition will work in this arena. I believe it will push it off-shore. I believe it can be regulated, and for those that say it can't I absolutely disagree. By bringing it on-shore, by authorization, by obtaining juris-

diction that is how you regulate; not by pushing it outside of your control.

With that, I've submitted my comments, Mr. Chairman, and would be more than happy to take any questions that you have.

[Prepared statement of Mr. Miller appears in appendix.]

The CHAIRMAN. Thank you, Mr. Miller, for your comments. They seem to be well-studied.

There are some that say that S. 692, if enacted, could actually increase the exposure of children and compulsive gamblers to online wagering. How would you respond to that?

Mr. MILLER. I think there is a potential for that because I think what it does is it creates a black market—there's no doubt. Although I believe it is prohibited under Federal law today, the people that I advise do not take U.S. wagers. If this were to become law, it does push it offshore. I think you can't—how are you going to regulate this? How are you going to stop children from gaining access? The way you do that is through regulation. The way you do that is through having a mandatory waiting period so that you can verify the players' age if you have to. If this bill becomes law, there will be no controls. It will simply be a matter of trying to enforce it, and I think——

The CHAIRMAN. The profits are offshore too, aren't they?

Mr. MILLER. Absolutely, there are many smaller countries especially that look at this as a real opportunity who would not have the gaming opportunity to profit from it.

The CHAIRMAN. Does the language used to preserve Federal jurisdiction over alleged violations on Indian lands effectively eliminate the concerns regarding a possible State enforcement of S. 692 on Indian lands?

Mr. MILLER. If I understand your question, I think what the bill does from my perspective is it creates a State jurisdiction over Indian lands, it gives the Attorney Generals of the State the authority to seek injunctions for violations of this act and possibly for violations now of, quote-unquote, "class II," gaming without a compact.

So from that standpoint, it could expands jurisdiction over States.

The CHAIRMAN. So would you say it's sort of a back door approach to eroding tribal sovereignty?

Mr. MILLER. In my opinion, it clearly affects what was intended by IGRA, and it does clearly erode additional tribal sovereignty, yes.

The CHAIRMAN. Thank you.

Senator Inouye, do you have some questions?

Senator INOUYE. Your prepared statement speaks of the Australian regulator?

Mr. MILLER. Yes, Senator.

Senator INOUYE. What do you mean when you say that virtual gaming would be easier to regulate than the present-day gaming?

Mr. MILLER. That's a broad statement, but I do believe that with the new technologies and the ability to go into computer networking and instantaneously audit games, instantaneously go in and review what's taking place, as opposed to going out, sending agents, performing audits, going after the fact—that's how most

gaming is regulated, after the fact; you maintain records, you go in, you look after the fact and see if you can find the problem—I believe with this new industry and this activity you have the potential to do it instantly, live, if you will; you can monitor it to find out what's going on at a given moment. I think there is the ability to regulate this and regulate it well.

I would point out that regulation does not mean expansion, and I think there is such a misunderstanding to that effect. Regulation, in my view, has always meant control, and putting those limitations and controls that a State or government felt, doesn't matter what policy was necessary—to quote-unquote—protect its citizens.

So I do believe that it can be, and in some regards easier than going out and having to deal with other types of gaming. There is more than casino gaming out there. There is charity gaming, there are the pull-tab markets, markets that, believe me, many States don't even regulate but have a lot of revenue, receive a lot of receive a lot of revenue through taxation.

Senator INOUYE. Now, the Kyl bill does not provide an exemption to Indian gaming as it relates to class II?

Mr. MILLER. That's correct.

Senator INOUYE. Your position is that IGRA should be carried out exempting class II, but should it exempt class III also?

Mr. MILLER. I crafted this position when I thought of your question early on sitting in the front row, and it seems like, at least, a starting point. A certain starting point would be first, class II, and with regard to class III, it seems to me why put a Federal prohibition? Why not allow that to be subject to negotiations between tribe and States?

Of horse racing interest now get greater authority, they now can use—they can have at-home—I mean, under this bill they could actually have at-home wagering, dog racing, State lotteries. It seems only right that the tribes and States should at least have the right to negotiate that aspect of this activity under the framework of IGRA.

Senator INOUYE. So it would be subject to a compact?

Mr. MILLER. In my opinion, that would be a proper response and a safe response.

Senator INOUYE. Thank you very much.

Mr. MILLER. Thank you, Senator.

The CHAIRMAN. Gentlemen, thank you very much for your testimony, and, with that, I would tell the witnesses that the record will stay open for the next 15 days for any additional comments that you would like to make, or anybody in the audience would like to comment.

With that, this hearing is adjourned.

Thank you.

[Whereupon, at 10:52 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF KEVIN V. DIGREGORY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Thank you, Mr. Chairman and members of the committee, for providing me this opportunity to provide the committee with the Department of Justice's views on Internet gambling and Indian gaming. As you know, the. issues surrounding both are complex, implicating a variety of complicated legal doctrines, including issues relating to free speech, federalism, sovereignty, state rights, and comity.

Despite the complexity of these issues, the Department's views on both Internet gambling and Indian gaming are rather straightforward. We believe that much of Internet gambling is already prohibited under existing laws. To the degree that emerging technologies have made new types of gambling activities possible, the Department strongly supports Congressional efforts to amend Federal gambling statutes to ensure that these new activities are prohibited. At the same time, however, it is equally important to ensure that any law prohibiting Internet gambling does not conflict with the rights or privileges of Indian tribes, both as sovereigns and under the Indian Gaming Regulatory Act [IGRA].

Internet gambling has proliferated in recent years. It is estimated that between 1997 and 1998, Internet gambling more than doubled, from 6.9 million to 14.5 million gamblers, with revenues doubling from $300 million to $651 million. This proliferation is troubling for three reasons.

First, since the Internet allows virtually instantaneous and anonymous communication that is difficult to trace to a particular individual or organization, the potential for operators of Internet gambling sites to successfully defraud their customers is significantly greater than with traditional casino-style gambling. Fraudulent activities could range from credit card fraud to the manipulation of gambling odds. In addition, the anonymity allowed by the Internet also makes the medium attractive to organized crime, since it is difficult for law enforcement to detect and prevent crimes being committed by unknown and untraceable persons.

Second, because the Internet provides people with virtually unfettered access to the opportunity to gamble at any time and from any place, Internet gaming presents a greater danger for compulsive gambling and severe financial consequences for the player.

Last, because the Internet is both anonymous and widely available, it is much more difficult to prevent minors from gambling. Currently, gambling businesses have no reliable way of confirming that gamblers are not minors who have gained access to a credit card and are gambling on their web sites.

While the Department of Justice supports a prohibition on Internet gambling, we believe that any legislation making gambling activities on the Internet illegal should have three important characteristics. First, such legislation should treat physical world activity and cyberactivity in the same way. If activity is prohibited in the physical world but not on the Internet, the Internet will become a safe haven for that criminal activity. On the other hand, it is hard to explain why conduct previously deemed acceptable in the physical world should suddenly become criminal

when carried out in cyberspace. Therefore, we strongly recommend that the legislative treatment of Internet gambling be consistent with existing Federal law. The most effective approach to ensuring such consistency, we believe, is to address Internet gambling and gambling over other media by the same set of Federal statutes, rather than by enacting a separate provision covering only Internet gambling.

Second, any effort to distinguish Internet transmission from other methods of communication is likely to create artificial and unworkable distinctions. For example, with the expected growth of digital Internet telephony—the use of the Internet or other packet-switched networks for pure voice communications—any effort to distinguish wagers placed via voice communications from wagers placed via electronic communications will lead to substantial confusion.

This leads to my third point, which is that any legislation should strive to be technology neutral. Legislation that is tied to a particular technology may quickly become obsolete and require further amendment. As a result, we believe it prudent to identify the conduct we are trying to prohibit, and then prohibit that conduct in technology-neutral terms. Often times, this can be most efficiently accomplished by amending existing laws, as opposed to creating a new technology-specific statutory scheme.

That being said, 18 U.S.C. sec. 1084—the Wire Communications Act currently prohibits someone in the business of betting and wagering from using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sporting event or contest. This law was originally enacted to assist the states and territories in enforcing their laws and to suppress organized crime involvement with gambling. The Department believes that many forms of Internet gambling can be effectively prosecuted under the Wire Communication Act and other Federal and State laws. Because most methods of connecting to the Internet involve the use of "wire communication facilities," anyone in the business of betting or wagering who transmits or receives bets and wagers on sporting events via the Internet is acting in violation of the Wire Communications Act. To the extent that Internet casinos are likely to be located abroad and beyond the easy reach of State authorities, the States are likely to seek Federal assistance more frequently when foreign casinos offer gaming to local citizens in violation of local law. Assisting States through enforcement of the Wire Communications Act, therefore, is fully consistent with the Department's law enforcement priorities.

Indeed, the Department already has prosecuted Internet gambling businesses under the Wire Communications Act. For example, in March 1998, the U.S. Attorney's Office for the Southern District of New York charged 22 defendants via criminal complaints with conspiracy, pursuant to 18 U.S.C. sec. 371, to violate section 1084 and section 1084 violations for the operation of on-line gambling sites. The websites involved in this prosecution were operated in countries in the Carribean and South America, including the Dominican Republic, Curacao, and Antigua. As of today, nine defendants have pled guilty; six to criminal informations alleging conspiracy to violate section 1084 and three to criminal informations alleging misdemeanors.

Despite these successes, however, the Department also recognizes that the advent of Internet gambling may have diminished the overall effectiveness of the Wire Communications Act, in part, because that statute may relate only to sports betting and not to the type of real-time interactive gambling [e.g., poker] that the Internet now makes possible. Therefore, the Department generally supports the idea of amending the Federal gambling statutes by clarifying that the Wire Communications Act applies to interactive casino betting and that the act covers all Internet use, even if Internet transmissions use modem technology—such as satellite communications—that may not be included in the traditional definition of "wire communications."

We also believe that the interrelationship between the Internet and Indian gaining authorized by IGRA must be examined in any legislation prohibiting Internet gambling. Since the formation of the Union, the United States has recognized Indian tribes as "domestic dependent nations" that exercise governmental authority over their members and their territory. In numerous treaties and agreements, our Nation has guaranteed the right of Indian tribes to self-government, and pledged to protect Indian tribes. The administration and the Attorney General respect and honor our Nation's commitments to Indian tribes.

Under the longstanding Federal Indian Self-Determination Policy, IGRA was enacted to promote "tribal economic development, self-sufficiency, and strong tribal governments" and to protect Indian tribes and the public from corrupt influences. IGRA has successfully promoted tribal economic development in many areas, and Indian tribes are strengthening their institutions of self-government. Indian tribes use the governmental revenue derived from gaming for governmental purposes, such

as roads, water systems, schools, hospitals, and law enforcement, among other things.

The Department of Justice has significant law enforcement responsibilities in Indian country, and as we have stated in earlier testimony to this committee, in the absence of adequate regulatory oversight, large scale gaming is subject to targeting by corrupt influences. Although the Department is not a gaming regulator, the Department is keenly interested in seeing the IGRA's regulatory system work well because the Department has complementary law enforcement authority under IGRA.

In addition, consistent with the principle of government-to-government relations and the Federal trust responsibility, the Department has pledged to support tribal self-government and to assist Indian tribes in the development of tribal law enforcement, tribal courts, and traditional justice systems. An effective gaming regulatory system, including minimum Federal standards, is essential to protect Indian gaming and the tribal governmental infrastructure and economic development attendant to it.

The Constitution vests the United States with authority over relations with Indian tribes. Absent a delegation of authority to the States, Federal law governs Indian commerce. IGRA "extends to the States a power withheld from the States by the Constitution," including opportunities to negotiate regulatory standards and regulatory roles related to class III Indian gaming. *Seminole Tribe* v. *Florida,* 116 S. Ct. 1114, 1124 (1996).

IGRA provides that Indian tribes should negotiate with States to conclude tribal-State compacts to regulate the operation of class III gaming on Indian lands, which are subject to the approval of the Secretary of the Interior. IGRA also provides that the States shall negotiate in "good faith" with the tribes, and that the tribes may sue the States for a failure to do so. The remedy in such circumstances is mediation supervised by the Federal courts. In *Seminole Tribe* v. *Florida,* the Supreme Court held that the Commerce Clause did not empower the Congress to abrogate the State sovereign immunity embodied in the 11th amendment. When a State raises the 11th amendment as a defense against a suit brought by an Indian tribe under IGRA, the suit is barred. Thus, *Seminole* has invalidated a step in IGRA's tribal-State compacting process. In our view, Congress should provide a legislative solution to this 11th Amendment problem.

In reviewing Senator Kyl's bill, introduced in the Senate as S. 692, the Department of Justice is concerned about its silence on Indian gaming on the Internet, especially in light of both its inclusion of exceptions for parimutuel wagering, State lotteries, and fantasy sports leagues and contests and IGRA's allowance of some electronic coordination between gaining facilities conducted entirely on Indian lands.

Of course, to the extent that Indian tribes seek to offer gaming to citizens of various States, where such gaining does not take place solely on Indian lands and is not authorized under state law, there is no compelling reason to exempt Indian tribes from the otherwise generally applicable provisions of the legislation for such off-reservation gambling.

I want to thank the committee again for asking me to present the Department's views on the Internet and Indian gaming issues. I would now be pleased to answer any questions you may have.

NATIONAL
INDIAN
GAMING
COMMISSION

TESTIMONY OF
THE HONORABLE MONTIE R. DEER, CHAIRMAN
NATIONAL INDIAN GAMING COMMISSION
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

June 9, 1999

Mr. Chairman, Mr. Vice-Chairman, members of the Committee, my name is Montie Deer and I am the Chairman of the National Indian Gaming Commission (NIGC or Commission). Thank you for the opportunity to appear before you today to testify on S.692, the Internet Gaming Bill.

The National Indian Gaming Commission defers to the Department of Justice with respect to the desirability and legality of this legislation and its specific provisions. However, if the bill is to be acted upon, we recommend that you consider the following concerns.

The use of the Internet websites to offer gaming entertainment is a relatively new activity. The most common scenario here is John Q. Public logging on to the Internet from his home to place wagers on a gambling website. However, the use of technology such as computers, satellites and telephone lines to offer games such as bingo and progressive slot machines is an activity that is widespread in Indian Country. While the Internet Gaming bill generally prohibits Internet gambling, the impact of this bill on legal gaming activities taking place in Indian Country is significant and substantial.

The Internet Gaming bill contains a blanket prohibition for gambling on the Internet but exempts several areas from the general prohibition. Section 1085(f)(1) provides that the bill would NOT apply to certain bets or wagers, including bets or wagers on (A) intrastate or multi-state lotteries placed on an interactive computer service using a private network; (B) live horse and dog racing placed on a closed-loop subscriber based service; and (C) lawful fantasy sports leagues or contests. However, S.692 does not provide an exemption for similar linked games which are currently offered by Indian tribes and are legal under the Indian Gaming Regulatory Act (IGRA). There are a variety of games legally operated in Indian Country which utilize this type of technology including, among others, linked bingo and wide area network slot-machine progressives. If S.692 was passed without an exemption for Indian tribes, many of the tribes which currently operate these types of games legally pursuant to valid tribal ordinances and Tribal-State compacts, would be in violation of the law. This would be contrary to Congress' intent when it passed the Indian Gaming Regulatory Act (IGRA). Thus, I strongly urge that S.692 contain an exemption for gaming activities operated on Indian lands.

Gaming activities on Indian lands must be conducted pursuant to the Indian Gaming Regulatory Act. Class II gaming must be conducted pursuant to a tribal ordinance approved by the Chairman

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of the National Indian Gaming Commission (NIGC) and Class III must be conducted pursuant to a tribal ordinance and valid Tribal-State compact, which generally provides for a state role in the regulation of Class III gaming. While use of the Internet to conduct certain gaming activities in Indian Country is the subject of litigation, we are concerned that legal satellite, computer and telephone communications between and among Indian tribal gaming facilities for purposes of conducting both Class II and Class III gaming are not specifically excepted from the prohibition I believe that the bill should make clear that such communications are not prohibited.

The National Indian Gaming Commission (NIGC) has approved satellite linking arrangements whereby bingo operations are linked via telephone line and satellite so that multiple facilities may participate in the same bingo game for larger prizes. The NIGC believes that such communications were contemplated by Congress in IGRA and we are concerned that the proposed legislation could detrimentally impact such communications.

Indeed, 25 U.S.C. § 2703 defines Class II gaming as the game of chance commonly known as bingo whether or not electronic computer, or other technological aides are used in connection therewith. In addition, Senate Report 100-446, a report on IGRA states:

> The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology . . ..

S. Rep. No. 100-446, 100th Cong., 2d Sess. 9 (1988) (emphasis added).

Thus, it is clear that Congress intended to allow tribes to use the very technology prohibited in S.692 for purposes of increasing player participation. Further, to this end, the NIGC has promulgated regulations which allow for the use of technology in offering these types of games. Specifically 25 C.F.R. § 502.3 defines Class II gaming as "Bingo or lotto (whether or not electronic, computer, or other technologic aides are used) . . .." Also, under the regulations, electronic, computer or other technologic aid "means a device such as a computer, telephone, cable, television, satellite or bingo blower . . .." 25 C.F.R. § 502.7. Thus, under the regulations, Tribes may conduct bingo using the type of technology that S.692 prohibits.

To be sure, there are many tribes that operate bingo games which utilize this technology to link the games with those games played at other tribal casinos. In addition, there are progressive slot machine games conducted pursuant to valid Tribal-State compacts which utilize computer and

closed-loop technology. The governmental gaming operated by the tribes is markedly similar to that conducted by the states -- such as lotteries. Since S.692 creates an express exemption for state lotteries, a similar exemption should exist for tribal governmental gaming. If states may operate linked lotteries under S.692 there does not seem to be a basis for denying the use of similar technology to tribal governments.

In addition to the technology problems which arise, section 1085(c)(2)(C) of S.692 regarding civil remedies provides that (1) the United States shall have the enforcement authority; and (2) that the enforcement authorities specified in an applicable IGRA Tribal-State compact shall be carried out in accordance with that compact. This section fails to recognize that Indian tribal governments are the first line of regulation of Class II gaming on Indian lands. Under section 2710(b) of IGRA, an Indian tribe may license and regulate Class II gaming on Indian lands provided certain requirements are met. Thus, under current federal law, tribes are the principal regulators of Class II gaming occurring on Indian lands and S.692 should recognize that tribes have the authority to enforce the laws regarding Class II gaming violations occurring on Indian lands.

Finally, 18 U.S.C. § 1304 prohibits broadcast of information concerning lotteries and other games of chance; however, IGRA exempts tribal gaming from this prohibition. Section 1085(b)(1) would prohibit the sending, receiving, or inviting of information assisting in the placing of a bet or wager. This broad prohibition could undo IGRA's exemption of tribes from the lottery information provisions of 18 U.S.C. § 1304. This legislation should not affect IGRA's exemption (25 U.S.C. § 2720) from section 1304 that allows Indian tribes to communicate section 1304 information between Indian gaming facilities located on Indian lands, and it should not prevent Indian tribes from using advancing technology to facilitate such intertribal communication. At the very least, S.692 should not prohibit the communication of gambling information on the Internet which could be disseminated lawfully in some other medium.

The Office of Management and Budget advises that there is no objection to the submission of this testimony from the standpoint of the Administration's program.

Again, I thank you for the opportunity to provide comment on this bill, S.692. I am available to answer your questions.

NATIONAL
INDIAN
GAMING
COMMISSION

June 8, 1999

The Honorable John McCain
United States Senate
Russell 241
Washington D.C. 20510

Dear Senator McCain:

Thank you for providing the National Indian Gaming Commission (NIGC) with the opportunity to provide comments on S.339, the Indian Gaming Regulatory Act Amendments of 1999.

As you will recall, S.339, and its predecessors, are the result of discussions between the NIGC and Senate staff which began over four years ago. At the time, the NIGC was a young agency struggling to situate itself, and the discussions led to the drafting of language which would fundamentally restructure the NIGC. Today, the NIGC is in a much different position than it was four years ago. The Commission is functioning much more smoothly, is pursuing strong enforcement policies and has promulgated internal control regulations intended to protect the integrity of Indian gaming. Many of these improvements are in the process of being implemented by the Commission and are a direct result of the increase in fee-based funding that you and others saw fit to provide to the NIGC. In short, many of the problems of the past, addressed by S. 339, have been resolved, and we do not believe that a wholesale restructuring of the NIGC is warranted at this time.

As proposed, S.339 would require major changes in the NIGC's structure, distribution of authority and procedures for promulgating internal controls. For example, S.339 would supersede the Indian Gaming Regulatory Act (IGRA) and provide for the establishment of a new Federal Indian Regulatory Gaming Commission (FIRGC). With a new FIRGC, we would expect a wholesale change in the regulatory processes and the concomitant lengthy time period required to reorganize and restructure. Furthermore, S.339 requires the new FIRGC to start anew the process for adopting Minimum Internal Control Standards (MICS) that are based on those of New Jersey or Nevada, which the NIGC just recently promulgated following extensive consultation with tribes.

Also, Section 9 of S.339 requires that an Advisory Committee on Minimum Regulatory Requirements and Licensing Standards be established for purposes of establishing minimum

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standards. The NIGC is supportive of the concept of adopting minimum regulatory standards. In January of this year, the NIGC published its final rule on Minimum Internal Control Standards (MICS) for Class II and Class III tribal gaming operations. As the NIGC embarked upon the course of establishing MICS it formed an Advisory Committee much like that required in S.339. The Committee was made up of tribal gaming officials so as to ensure tribal input. Officials representing large and small gaming operations commented on our procedures. The NIGC also retained the Las Vegas office of the accounting firm Arthur Anderson to assist in the drafting of the regulations. The MICS rule, among other things, contains comprehensive standards and procedures that govern cash handling, documentation, game integrity, auditing and surveillance. The rules require that all gaming tribes will need to adopt MICS by August 4, 1999, and tribes must be in compliance with their MICS by February 4, 2000. If S.339 were passed as presently proposed, it would essentially require the NIGC to reinvent the wheel and, during the interim, subject Indian gaming to continued allegations that it is not properly regulated.

Accordingly, the NIGC is now moving forward on its own to implement minimum standards. However, notwithstanding our recent promulgation of MICS, we have heard from some tribes that they do not believe that the IGRA provides the NIGC with the authority to issue such regulations. Accordingly, legislation which affirms the NIGC's authority to promulgate the MICS, and other minimum standards, would no doubt alleviate any potential litigation over the matter.

We believe that amendments to IGRA should address the following issues, some of which are contained in S.339:

1) *Devise a system to assure regulation of gaming when states fail to negotiate in good faith.* The resolution of this impasse should be a priority. The preferable approach is to have Congress amend IGRA so as to avoid years of litigation and uncertainty. Unless or until there is a fair, efficient means for tribes to secure a hearing and a remedy in those situations where states fail or refuse to negotiate Class III gaming compacts in good faith, litigation and questionable tribal gaming practices will proliferate and divisiveness between sovereign states, tribes and the federal government will be prolonged.

2) *Develop a national licensing system for gaming related contracts.* An ability to scrutinize persons involved in consulting agreements, and similar gaming related contracts, would be an improvement in our regulatory scheme. Currently, there is a serious gap in the regulatory process because, under the current statutory authority, the NIGC is unable to identify potential corrupting influences which might be using vending contracts as a foothold into Indian gaming. The problem is that, because IGRA requires only the approval of management contracts and not the approval of consulting agreements and other similar arrangements, some parties have attempted to circumvent the management contract approval requirements by claiming that they are merely providing consulting or vendor services, or that they are simply lenders attempting to assure that they will be repaid in full. Parties to such contracts are not subject to NIGC background investigations

before they conduct business with tribes.

Therefore, the NIGC would support an amendment to IGRA which would establish a national licensing system for management contractors, consultants, vendors, and lenders, on which states and tribes could rely, if they so chose. Under section 10 of S.339, licenses would be required of (1) gaming operations, (2) key employees of a gaming operation, (3) management- and gaming-related contractors, (4) any gaming service industry, and (5) any person who has material control over licensed gaming operations. We believe that this provision, with some further detail, would create the necessary authority for the Commission to maintain the integrity of Indian gaming through licensing. This would allow for a more uniform system, allowing tribes to make decisions more quickly on persons and entities that were already licensed, and should eliminate attempts to circumvent the management contract approval process.

The "material control" standard under subsection (5) still requires the NIGC to conduct an investigation of whether the party has "material control." This requires much time and resources and without a more objective standard, this subsection will require the NIGC to conduct lengthy and costly investigations. Thus, the NIGC recommends that section should also cover: "Any party who has a contract with a tribal gaming operation totaling over $25,000 annually."

3) *Confirm Chairman's authority to delegate certain authorities provided under IGRA.* As the NIGC's responsibilities and size expand, it becomes more and more critical that the Chairman be allowed to delegate to his directors some of the responsibilities to bring some enforcement actions. In the past, there have been questions raised as to the Chairman's authority to delegate these functions. The NIGC should not have to weigh the costs of potential litigation when deciding what functions should be delegated.

4) *Grant the Commission better access to law enforcement information.* Specifically, in S.339, section 7(d)(4) establishes the NIGC as a law enforcement agency for purposes of sharing information necessary to enable the Commission to carry out this Act. Such a provision, which would expedite the sharing of information, is critical to the NIGC's function of obtaining background information and expediting background checks. Currently, the Commission encounters difficulty in obtaining such information because other law enforcement agencies do not consider the NIGC a "law enforcement agency" and thus, will not generally disclose the information requested of them. In addition, information obtained from other law enforcement agencies under this section will be protected from disclosure.

The Department of Justice has advised me that they may have additional suggestions as to how to improve the bill.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Again, I thank you for the opportunity to provide comment on this bill, S.339 which would seriously affect the National Indian Gaming Commission. I would be happy to answer any questions from you or your staff regarding this or any other matter of mutual concern.

Sincerely,

Montie R. Deer
Chairman

Revised: 6/3/99
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Lac Vieux Desert Band of Lake Superior Chippewa Tribal Government
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John McGeshick Jr.
Tyrone McGeshick

Testimony of:

RICHARD WILLIAMS, CHAIRMAN
LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS

Before the:

106TH CONGRESS'
SENATE COMMITTEE ON INDIAN AFFAIRS

Oversight Hearing on Internet Gaming

June 9, 1999

I. INTRODUCTION

Good Morning Mr. Chairman and Members of the Committee on Indian Affairs. My name is Richard Williams, and I am the elected Chairman of the Lac Vieux Desert Band of Lake Superior Chippewa Indians. Thank-you for the opportunity to provide you with testimony regarding Internet gaming in Indian Country and about our Class II Internet Bingo game. As you know, Senate Bill 692 and the Kyl Bill, which is intended to prohibit Internet gaming, is steadily progressing through the Senate process, and ***no*** Hearings have been held on the effects of this Bill on Indian Nations. As I will demonstrate, the Kyl Bill amends the Indian Gaming Regulatory Act in a harmful manner, and will disrupt the balance between Tribes and States that the IGRA was designed to protect. For my Tribe in particular, the effects of the Kyl Bill as it is currently drafted would bankrupt my Tribe and devastate my people.

Chairman Campbell, my Tribe has invested millions of dollars and countless hours developing a Class II Bingo game that utilizes Internet technology to expand its participation levels. As you know, my Tribe—like most Tribes around the United States—does not have the economic viability to invest such a large amount of money into developing a Class II Bingo game haphazardly. Instead, we developed this game because ***you and the rest of Congress*** encouraged us to do it. As you know, the Indian Gaming Regulatory Act, in its legislative history, encouraged the Tribe to expand its Class II Bingo participation levels by using the latest in technology and telecommunications, such as the Internet.

In making this statement, I will divide my testimony into three areas. First, I will discuss how the Indian Gaming Regulatory Act treats Class II Bingo differently from other types of gaming. Second, I will demonstrate how our Class II Bingo game is entirely played on the

Reservation, and therefore legal under the Indian Gaming Regulatory Act. And finally, I will discuss why Class II Bingo should be given an exception from a Congressional policy perspective.

A. Class II Bingo and the Indian Gaming Regulatory Act.

First, while IGRA anticipates that Tribal *gaming occurs* on Indian lands, it does not require that players be *physically located* on Indian lands. Class II Bingo conducted with the use of the Internet *occurs entirely* on Indian lands. Specifically, all three elements of gaming—consideration, chance and prize—occur on the Reservation.

IGRA specifically authorizes the use of electronic, computer and other technologic aids in conjunction with Bingo. In its legislative history, IGRA encourages Tribes to expand Bingo audiences with the use of the latest technology and telecommunications, such as the Internet. IGRA further provides a specific exemption from the anti-lottery statutes. Finally, IGRA provides that the player need not even participate directly in the game, but rather a "holder", which acts as the player's agent, can legally play Bingo for the player.

The National Indian Gaming Commission has ruled that a "holder" can play Class II Bingo for a player so long as the holder performs the functions of the player and is located on Indian lands. U.S. Courts also have held that Class II Bingo games that utilize technological "holders" to play Bingo on behalf of a player is legal under the terms and conditions of IGRA.

B. How the Bingo Game Is Played Legally.

The language, design and object of IGRA provides the unique ability for a Tribe to expand its Class II Bingo participation with the assistance of the Internet. In order to explain how all of the elements of Internet Bingo can occur on Indian lands, a brief example of how our Internet Bingo operates is warranted.

First, players access the Tribe's Class II Bingo web site by entering the Tribe's address on the Internet browser and establishing an account. When the player establishes an account to play Class II Bingo, the player provides the "holder" physically located on the Reservation with his or her preferences for playing bingo, such as how many Bingo cards to purchase and what games to play.

The holder on the Reservation then acts as the player's agent and purchases Bingo cards, selects games to play, and marks the Bingo cards. The Internet Bingo game is then conducted live by the Tribe in accordance with the standards and qualifications of a Class II device as defined by IGRA. The numbers are pulled from a standard Bingo ball blower and announced by a Caller.

Thus, the holder allows the player to participate in the game without the player actually purchasing the Bingo cards, making strategic decisions or marking the Bingo cards. Thus, the elements of consideration, chance and prize all occur entirely on Indian lands and in complete conformance with IGRA.

By the way, the legislative history of Class II Bingo and the provision of a "holder" for the play of Bingo, are the two caveats that distinguish completely from the Class III Lottery game of Couer D' Alene, thereby distinguishing us from the recent court case against them.

C. Congressional Policy Considerations for an Exception.

Even if you do not completely agree with the legal analysis set forth above, I appeal to you to view our Bingo game from a policy standpoint. The Kyl Bill is essentially creating ***two groups***: i) gaming groups that are ***prohibited*** (such as off-shore gaming companies), and ii) gaming groups that are ***granted exceptions*** (such as horse and dog pari-mutual wagering, state lotteries, and authorized state gaming). Once you step back and look at the similarities in these respective groups, I do not believe that Congress intends to prohibit Class II Bingo.

For example, the gaming groups that are prohibited—such as off-shore gaming companies—have certain common characteristics. First, they are *unregulated*, or are regulated *off-shore* under *questionable jurisdictions* such as Antigua. Second, they have *questionable policies* such as accepting any bets from any person. Third, the companies have *poor reputations* for paying customers for legitimate winnings. Fourth, because the companies are off-shore, the U.S. *can not protect consumers* from fraudulent company practices. Fifth, the games also consist of Class III games such as slot machines, video poker and video blackjack therefore *appealing to problem gamblers*. Finally, because the companies are unregulated, there is *no way to measure the integrity or results* of the games.

On the other hand, the gaming groups that are given exceptions by the Kyl Bill—such as horse racing, fantasy sports leagues, and state lotteries—also have common characteristics. First and foremost, the federal government *regulates* the gaming *ensuring the integrity* of the games, *protecting consumers* from unscrupulous operators, and *guaranteeing payment*. Second, the gaming is *pari-mutual in nature*, meaning that the players play against each other trying to win a money pool, rather than against a machine. Third, the gaming is *conducted live*, whereby players may witness the results. Fourth, the gaming *requires skill* thereby *deterring problem gamblers*.

Now that you see the two groups—and have identified policy reasons for placing gaming in each of the two groups—I ask you one simple question: ***Which group does Indian Tribal Class II Bingo belong?*** Like the gaming interests given exceptions in the Kyl Bill, Class II Bingo is ***regulated*** by the Federal government ***ensuring integrity***. Like horse racing, it is ***pari-mutual wagering***. Players do not play against a machine, but rather against each other in a ***live*** setting and Bingo ***requires skill*** in order to win. The game is ***not*** Class III gaming.

When one looks at the characteristics of the Tribe's Class II Bingo, it very simply fits better into the gaming groups that are given exceptions and not the groups that are being prohibited. Therefore, if you find it necessary to prohibit the Tribe's Class II Bingo—even in light of its similarities to excepted game—then I ask you to provide reasons for placing Class II Bingo in the prohibited group and not the excepted group.

II. CONCLUSION

As demonstrated, Congress contemplated the use of technological aids to link participating individuals to play Bingo from remote locations in order to increase player participation for Tribes. It is clear the use of telecommunication devices, including the Internet,

are technological aids available to Class II Bingo operations on Indian lands. In summary, when applying Class II Internet Bingo to the language, design, and object of IGRA, the statute clearly demonstrates that Class II Internet Bingo is protected by the preemptive effect of IGRA. Indeed, the Tribe followed Congress' advice in developing this game.

As also demonstrated, Bingo from a policy perspective is similar to other gaming interests receiving exceptions, and less like gaming interests that the Kyl Bill aims to prohibit. For example, state lotteries, the horse and dog racing industry, fantasy sports leagues and contests, and the gaming states of New Jersey and Nevada are all presumably excepted from the Bill to protect their interests. I have demonstrated to you that the Tribe's Class II Bingo is very similar to the games given exceptions. It is extremely unfair and unjustifiable that Indian tribal governments are not granted the same protection as other gaming interests, especially because the Class II Bingo game developed by the Tribe falls squarely within the statutory regulations of State and Federal laws.

Because my testimony is legally complex, I have attached a detailed legal analysis of everything that I presented to you today. I would encourage you and your legislative counsels to review this legal analysis before coming to any conclusions about prohibiting Class II gaming.

Finally, I have attached an Amendment, which is very limited in scope. The Amendment basically provides for a Class II Bingo exception to the Kyl Bill. This means Indian tribes would be extremely limited in the games they can conduct using Internet technology. For example, Tribes could ***not*** offer any Class III or sports wagering over the Internet under this exception. It basically only allows for what Congress intended in the actual language of IGRA.

Once again, I thank you for inviting me to testify and am ready to answer any questions you have regarding the Tribe's Class II Bingo game and our ultimate future and welfare.

CLASS II BINGO EXCEPTION

At the end of Section (f)(1) entitled, "APPLICABILITY" add the following new Subsection (C):

"(C)any otherwise lawful wager for Class II gaming as defined in Section 4 of the Act of October 17, 1988 102 Stat. 2467, conducted by an Indian Tribe on Indian lands (as defined in Section 4(4) of the aforementioned Act)."

MONTEAU, PEEBLES & MARKS, L.L.P.

ATTORNEYS AT LAW

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MEMORANDUM

TO:	106th Congress' Senate Committee on Indian Affairs
FROM:	Monteau, Peebles & Marks, L.L.C.
DATE:	June 9, 1999
RE:	Legal Memorandum to Accompany Chairman Williams June 9, 1999 Testimony for the Oversight Hearing on Internet Gambling

I. INTRODUCTION

We would like to thank you Mr. Chairman Campbell and the members of the Indian Affairs Committee for the opportunity to discuss the Indian Gaming Regulatory Act ("IGRA") and its relationship to gaming on the Internet. However, we will limit our comments to the use of the Internet with the operation of a Class II Bingo game as defined in IGRA (25 U.S.C. § 2703(7)(A)(i).

II. The Indian Gaming Regulatory Act Generally

Congress found that existing federal law did not provide clear standards or regulations for the conduct of gaming on Indian lands (25 U.S.C. § 2701(3)); that a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; 25 U.S.C. § 2701(4), and that Indian tribes have the exclusive right to regulate gaming on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity. 25 U.S.C. § 2701(5).

The Congressional policy behind the enactment of IGRA was to provide a statutory basis for the operation of gaming by Indian tribes as a means for promoting tribal economic development, self-sufficiency, and strong tribal government; 25 U.S.C. § 2702(1); to provide a statutory base for the regulation of gaming by Indian tribes adequate to shield it from organized crime and other corrupting influences to ensure that the Tribe is the primary beneficiary of the gaming operation, to assure that the gaming is conducted fairly and honestly by both the operator and the players (25 U.S.C. § 2702(2));

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and to establish an independent federal regulatory authority for gaming on Indian lands (25 U.S.C. § 2702(3)).

A. Class II Bingo

IGRA categorizes gaming into three (3) classes. Class I gaming is defined as social games solely for prizes of minimal value or traditional forms of gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). The term Class II gaming is defined as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith).[1] Class II games also include, if played at the same location, pull-tabs, lotto, punch boards, tip jars, instant bingo, and games similar to bingo as well as non-banking card games not specifically prohibited by state law, explicitly authorized by State law or not explicitly prohibited by State law and are played at any location in the state but only if the card games are played in conformity to those laws and regulations (if any) of the state regulating hours or periods of operation or limitation on wagers or pot sizes; and card games played in Michigan, North Dakota, South Dakota, and Washington that were actually operated in the state by a tribe on or before May 1, 1988. 25 U.S.C. § 2703(7)(C). Class III gaming is defined as all forms of gaming that are not Class I or Class II gaming. 25 U.S.C. § 2703(8). Class III gaming includes all banking card games, casino games, electronic or electromechanical facsimiles of any game of chance on slot machines of any kind.[2] Neither IGRA nor the regulations promulgated pursuant thereto define what constitutes a slot machine.[3]

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[1] The Indian Gaming Regulatory Act does not define "electronic, computer or technologic aid". However, the regulations promulgated pursuant to IGRA provide at 25 C.F.R. § 502.7 provide:

> Electronic, computer or technologic aid means a device such as a computer, telephone, television, satellite or bingo blower and that, when used:
> (a) Is not a game of chance but merely assists the player or the playing of the game;
> (b) Is a readily distinguishable means of device such computer, telephone, cable, television, satellite, or bingo blower that when used: (i) is not a game of chance but merely assists the player or the playing of the game; (ii) is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; or
> (c) Is operated in accordance with the applicable federal communications laws.

[2] The Code of Federal Regulations at 25 C.F.R. 502.8 defines "electronic or electromechanical facsimile" as "any gaming device as defined in 15 U.S.C. § 1171(a)(2) or (3)." 15 U.S.C. § 1171(a)(2) provides:

> (a) The term "gambling device" means--
> (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
> (2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

15 U.S.C. § 1171(a)(3) provides:

Class I gaming on Indian lands is within the exclusive jurisdiction of the tribe and is not subject to the provisions of IGRA. 25 U.S.C § 2710(a)(1). A tribe may engage in Class II gaming on Indian lands, within the tribe's jurisdiction, if such gaming is located within a state which permits such gaming for any purpose by any person, organization or entity and the governing body of the tribe adopts an ordinance or resolution which is approved by the Chairman of the National Indian Gaming Commission ("NIGC"). 25 U.S.C. § 2710(b)(1).

Class III gaming is lawful on Indian lands if the Class III gaming activities are authorized by an ordinance or resolution adopted by the governing body of the tribe having jurisdiction over the lands, the ordinance or resolution meets the requirements set forth in 25 U.S.C § 2710(b) and is approved by the Chairman of the NIGC, and the gaming is conducted in a state that permits such gaming for any purpose by any person, organization or entity and is conducted in conformance with a tribal-state compact entered into by the tribe and the state. See 25 U.S.C. 2710(d). A tribal-state compact negotiated pursuant to the provisions of IGRA may include provisions relating to: the application of civil and criminal laws and regulations of the tribe or state that are directly related to, and necessary for the licensing and regulation of, the gaming activity; the allocation of civil and criminal jurisdiction between the state and the tribe necessary for the enforcement of such laws and regulations; the assessment by the state of such activities in such amounts as are necessary to defray the cost of regulating such activities; taxation by the tribe of such activities in amounts comparable to amounts assessed by the state for comparable activities; remedies for breach of contract; standards for the operation of such activity and maintenance of the gaming facility, including licensing; and any other subject directly related to the operation of the gaming activities. 25 U.S.C. § 2710(3)(C).

IGRA authorized the use of electronic, computer and other technologic aids in conjunction with bingo and lotto (25 U.S.C. § 2703(7)(a)), (25 C.F.R. § 502.3(a)) and arguably exempted gaming conducted pursuant to IGRA from 18 U.S.C. §§ 13, 371, 1084, 1305 - 1307, 1952 - 1955, and 1961 - 1968; 39 U.S.C. § 3005 and 15 U.S.C. §

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(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

The regulations set forth at 25 C.F.R. § 502 were upheld in Cabazon Band of Mission Indians v. National Indian Gaming Commission, 827 Fed. Supp. 26 (D.D.C. 1993) (affirmed 14 Fed. 3d 636 (D.D.C. Cir. 1994)).

[3] However, Scarne's New Complete Guide to Gambling, published by Simon and Shuster, Fireside Edition 1986, defines a slot machine as "The slot machine is essentially a cabinet housing three or more narrow cylindrical drums, commonly called reels, which are marked with symbols. Vertically disposed on a common axis, the reels are caused to revolve freely when a player activates the machine and pulls a leverlike handle affixed in the side of the cabinet. Awards or payoffs, which are generally paid automatically, are usually based on the horizontal alignment of symbols, when the spinning reels come to a position of inertial rest."

1171 - 1178. The Report of the Senate Select Committee on Indian Affairs on the Indian Gaming Regulatory Act provided:

> The phrase "not otherwise prohibited by Federal Law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175. That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands. The Committee specifically notes the following section in connection with this paragraph: 18 U.S.C. section 13, 371, 1084, 1303-1307, 1952-1955, and 1961-1968; 39 U.S.C. section 3005; and except as noted above, 15 U.S.C. 1171-1178. However, it is the intention of the Committee that nothing in the provision of this section or in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act (Act of September 30, 1978, 92 Stat. 813; P.L. 95-395) and the Maine Indian Claim Settlement Act (Act of October 10, 1980; 94 Stat. 1785; P.L. 96-420.

B. Exception to the Anti-Lottery Statutes

IGRA provides a specific exemption from the anti-lottery statutes. IGRA at 25 U.S.C. 2720 provides, "Consistent with the requirement of this chapter, sections 1301, 1302, 1303 and 1304 of Title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter." The anti-lottery statutes prohibit the interstate transportation of tickets, shares or interest in a lottery, gift enterprise or similar scheme. The use of the mail to deliver lottery or gift enterprise related materials, and the broadcasting on radio or television the advertisement of or information concerning any lottery, gift enterprise or similar scheme. Clearly, by exempting tribal gaming from the anti-lottery statutes, Congress not only provided the legal authority for, but encouraged tribes to expand, their player base beyond the exterior boundaries of tribal reservations.[4]

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[4] The anti-lottery statutes set forth at 18 U.S.C. § 1301 provide as follows:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in art upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or, being engaged in the

business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1302 provides as follows:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;
>
> Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in who or in part upon lot or chance;
>
> Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or any share or chance in any such lottery, gift enterprise, or scheme;
>
> Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent upon lot or chance, or containing any list of the prizes drawn or awarded by any means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;
>
> Any article described in section 1953 of this title --
>
> Shall be fined under this title or imprisoned not more than two years, of both; and for any subsequent offense shall be imprisoned not more than five years.

Section 1303 provides as follows:

> Whoever, being an officer or employee of the Postal Service, act as agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letters, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in who or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in who or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined under this title or imprisoned not more than one year, or both.

Section 1304 provides as follows:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

Section 1307 provides as follows:

Bingo, as defined in IGRA, requires the "holder" of the cards, as opposed to the player, to cover the numbers or designations with objects similarly numbered or designated or drawn or electronically determined. The discussion of "holder" is more fully developed in section

III. Bingo and the Use of Technological Aids

IGRA specifically authorizes the use of electronic, computer, or other technologic aids in conjunction with bingo and lotto. 25 U.S.C. § 2703(7)(A)(i); 25 C.F.R. § 502.3. The game of bingo is defined at 25 U.S.C. § 2703(7)(A)(i) as follows:

> The game of chance, commonly known bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) (i) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations (ii) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and (iii) in which the game is

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1307. Exceptions relating to certain advertisements and other information and to State conducted lotteries

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to--
(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is--
(A) contained 'in a publication published in that State or in a State which conducts such a lottery; or
(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or
(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), -that is authorized or not otherwise prohibited by the State in which it is conducted and which is--
(A) conducted by a not-for-profit organization or a governments] organization; or
(B) conducted as a promotional activity by a commercial organization and is clearly
occasional and ancillary to the primary business of that organization.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing--
(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or
(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country.. dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

> won by the first person covering a previously designated arrangement of numbers or designations on such cards.

Congress recognized that technologic aids could be used to expand the number of participants in tribally conducted bingo, lotto, and other such games.[5] The Senate Select Committee on Indian Affairs Report on the Indian Gaming Regulatory Act provided:

...

> [T]he committee intends in section (8)(A)(i) that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II games to existing game sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operating and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television, or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

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[5] The Code of Federal Regulations at 25 C.F.R. § 502.3 defines bingo as:

> Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:
>
> (1) Play for prizes with cards bearing numbers or other designations;
> (2) Cover numbers or designations when object, similarly numbered or designated are drawn or electronically determined ; and
> (3) Win the game by being the first person to cover a designated pattern on such cards;
>
> ...

The use of computers, technologic aids, cable, television, and satellites in bingo and lotto games was clearly contemplated by Congress through the enactment of IGRA. Congress contemplated the use of technologic aids to link participating bingo gaming facilities and individuals to play bingo games from remote locations in order to increase player participation in the bingo game. It is clear that the use of telecommunication devices, including the Internet, are technologic aids available to tribal gaming operations on Indian lands.

IV. Internet Class II Bingo Is Conducted Entirely on Indian Lands

IGRA authorizes a player not physically present on Indian lands to participate in tribally operated Internet bingo. The express language of IGRA does not require that the bingo player be physically located on Indian lands. Specifically, 25 U.S.C. § 2703(7)(a)(i)(II) requires that the holder of the card cover the numbers or designations when objects, similarly numbered or designated are drawn or electronically determined. Given the express language of IGRA as well as the broad policies to expand player participation as well as not limiting Indian bingo to the current technology, it is clear that tribally-operated Internet bingo does not require the player to be physically present on an Indian reservation. While IGRA does anticipate that *gaming* conducted by a Tribe occur *on Indian lands*, see 25 U.S.C. § 2701(5), 2702(3), 2710(a)(1), (b)(2), (d)(1), as set forth more fully below, gaming conducted with the use of Internet technology can occur entirely on Indian lands, even though the player is not physically located on Indian lands.

Gaming, or "gambling," has been broadly defined as including any game containing the elements of prize, chance and consideration. *Black's Law Dictionary*, 611 (5th Ed. 1979); See, F.C.C. v. American Broadcasting Co., 347 U.S. 284, 290 (1954). When operated in accordance with the assumptions set forth above, all three of the essential elements of gaming can be conducted on Indian lands, even though a player is not physically present on Indian lands.

As has been established, the use of computers and technological aids in conjunction with bingo is specifically provided for in IGRA.[6] "In this regard, Congress considered the possibility that gaming activities might occur in more than one location, 'in the same or different States' and be linked together 'by means of telephone, cable, television or satellite.'"[7] Congress clearly noted that this class II bingo use of technology to expand player participation is distinguished from Class III gaming when it stated, ". . . [class II] technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles [class III] in which a single participant plays a game with or against a machine rather than with or against other players."[8] Congress contemplated the use of technologic aids to link participating bingo gaming facilities and individuals to play bingo games from remote locations in order to

[6] 25 U.S.C. Sec. 2703(7)(A)(i); 25 C.F.R. Sec. 502.3.
[7] Coeur D'Alene, Case No. CV97-392-N-EIL, at 11; See Also, Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir. 1994)(citing Senate Committee Report), cert. denied, 116 S. Ct. 297 (1995).
[8] S. Rep. No. 446, 100th Cong., 2d Sess. 9 (1988).

increase player participation. It is clear the use of telecommunication devices, including the Internet, are technological aids available to tribal bingo operations on Indian lands.

With respect to Class II bingo, the facts demonstrate that Internet bingo would fall squarely within the statutory and regulatory definitions of IGRA. The regulations implementing IGRA define bingo as a game played for prizes with cards bearing numbers, players cover the numbers drawn, and players win by being the first to cover a designated pattern on such cards.[9] "There is nothing in IGRA or its implementing regulations, however, that requires a player to independently locate each called number on each of the player's cards and manually 'cover' each number independently and separately. The statute and the implementing regulations merely require that a player cover the numbers without specifying how they must be covered."[10] Indeed, IGRA provides that the player need not even participate directly in the game, but rather a "holder", which acts as the player's agent, play the game for the player.

The National Indian Gaming Commission has ruled that a "holder" can play Class II bingo for players so long as the holders perform the functions of the player and are located on Indian lands.[11] Furthermore, Class II bingo games that utilize technological "holders" to play the game in behalf of the player have been held to fall under the terms and conditions of IGRA.[12]

A. How the Tribe's Internet Game Is Played

In order to more fully explain how all of the elements of tribal Internet bingo can occur on Indian lands, a brief example of how a tribal Internet bingo operation may operate is warranted.

First, players access the Tribe's Class II Bingo web site by entering the Tribe's address on the Internet browser and establishing an account. When a player establishes an account to play Class II bingo via the Internet, the player is providing a "holder" on the Reservation with his/her preferences for playing bingo, such as how many cards to buy and what games to play.[13]

The holder on the Reservation then acts as the player's agent and purchases bingo cards, selects games to play, and marks the bingo cards. Thus, the holder allows the player to participate in the game without the player actually purchasing, making strategic

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[9] 25 C.F.R. Sec. 502.3.

[10] United States v. 103 Electronic Gambling Devices, 1998 WL 827586, 827592 (M.D. Cal. Nov. 23, 1998).

[11] See Letter from Harold Monteau, Commissioner, NIGC to Larry Montgomery, July 26, 1995.

[12] See United States v. 103 Electronic Gambling Devices, 1998 WL 827586 (M.D. Cal. Nov. 23, 1998)(holding that video bingo player-stations which permit players at remote locations to participate in a common bingo game do have the effect of broadening player participation, and thus constitute class II electronic aids); See United States v. 162 MegaMania Gambling Devices, 1998 U.S. Dist. LEXIS 17293 (N.D. Okla., Oct. 23, 1998); July 27, 1997 NIGC Advisory Opinion regarding MegaMania.

[13] In a single bingo game, there can actually be several different variations of bingo leading up to one final bingo game. For example, a player may prefer to play "four corners" while leading up to "blackout".

decisions or marking the bingo cards. Thus, the gaming elements of consideration, chance and prize all occur entirely on Indian lands.

B. Supporting Contract Law

The conclusion that tribal Internet bingo in this scenario would occur on Indian lands is supported by well-established legal precedent applied in similar contexts, including conflicts of law and contracts principles.

A commercial Website has been held to be the equivalent of an advertisement in a national publication. Hearts v. Goldberger, *supra*. Fundamental tenets of contract law establish that an advertisement constitutes an invitation to make an offer. Restatement (second) of Contracts § 26 Cmt. b (1979) (West, Westlaw 1998). When a remote Internet bingo player links to an on-reservation computer and directs the on-reservation computer to purchase an Internet bingo card, the player is making an offer to purchase. *The offer is not accepted nor is the wager placed until accepted on-reservation.*

A tribal Internet bingo is analogous to a contract consummated via telephone. It is well established that when an offer is relayed by telephone, the contract is formed at the place where the offer is accepted:

> The question which has arisen time and time again before the Courts has been the place at which the contract should be regarded as having been made. This has been held to be the place at which the offeree speaks the words of acceptance into the telephone transmitter. The restatement (second) [of contracts] in commentary recognizes this principle of conflict of laws. To the extent the place of making of the contract is relevant to resolving the question of which jurisdictions law governs the formation of the contract, it unequivocally accepts the principle that the contract is made in the place where the acceptance is spoken.

J. Perillo, Ed., Corbin on Contracts Section 3.25 at pages 447-48 (1993) (footnotes omitted). Accord, Perrin v. Pearlstein, 314 F.2d 863, 867 (2nd Cir. 1963); Joye v. Heuer 813 F.Supp 1171, 1173 (D.S.C. 1993); In re: Standard Financial Management Corp., 94 B.R. 231 (D.Mass. 1988); Lockwood Corp. v. Black, 501 F.Supp 261, 264 (N.D.Tex. 1980). Furthermore, it has been held that, "where an acceptance has been given by telephone, the situs of the contract is where the acceptor speaks his acceptance, and it is *that law which controls the interpretation of the contract* . . . and that state's law must apply *to all transactions between the parties*." Lockwood, *supra*, at 264 (citations omitted) (emphasis supplied).

Under established law regarding contracts and conflict of laws, the place where contract is consummated is where acceptance occurs, and the transaction is deemed to

have taken place within the jurisdiction where the acceptance occurs. Furthermore, the substantive law of the situs where the contract is consummated applies to that transaction. Under the scenario of tribal Internet bingo, the transaction between the remote player and the Tribe is deemed to take place on the reservation, and hence the substantive law of the Tribe thus applies to said transaction. See, White Mountain Apache Tribe v. Smith Plumbing Company, Inc., 826 F.2d 1301. (Jurisdiction over activities of non-Indians concerning transactions taking place on Indian lands presumptively lies in the Tribe.)

Courts applying conflicts of law principles have also held that a citizen of one jurisdiction may be legally bound by the terms of a contract entered into with a citizen of another jurisdiction, even though the contract is illegal or contrary to the laws of the former jurisdiction. See e.g., Rhody v. State Farm Mutual Insurance Company, 771 F.2d 1416, 1421 (10th Cir. 1985) (interpreting Oklahoma law).

V. DISTINGUISHING COUER D' ALENE

As you are probably aware, the US District Court in Idaho held that IGRA is not applicable to the Couer D'Alene Tribe's lottery, which can be played via toll-free interstate telephone service.[14] Specifically, the court found that because the 800 telephone service allows a player to directly purchase a lottery chance off the reservation, the gaming is considered to be held off Indian lands and therefore, the lottery does not fall under the provisions of IGRA.[15]

The Coeur D'Alene case, however, is clearly distinguishable from tribally conducted Class II bingo via the Internet. In its simplest form, the distinction is that Coeur D'Alene's lottery is a Class III game under the terms and conditions of IGRA while bingo is a Class II game.[16] This distinction is important for two reasons, to wit: i) IGRA specifically contemplates the expansion of Class II bingo participation through the use of technology and telecommunications such as the Internet and does not provide for that same expansion for Class III gaming; and ii) in light of the intended participation expansion, IGRA provides Class II bingo with a "holder" to purchase the Class II bingo chances for the player as opposed to Class III gaming.

In the Coeur D'Alene case, the court's decision rested on the fact that the player directly purchased Class III lottery chances off the Reservation, and therefore the element of consideration did not occur on Indian lands as required by IGRA. This is because IGRA does not provide Class III gaming the same dynamics for increasing player participation by using technology such as the Internet, and further providing Class III gaming with a "holder" to purchase chances as it does for Class II bingo.

In summary, when applying Class II Internet bingo to the language, design, and object of IGRA, the statute clearly demonstrates that Class II Internet bingo is protected

[14] AT&T Corp. v. Coeur D'Alene Tribe, US District Court, Case No. CV97-392-N-EIL, (Idaho, Dec. 17, 1998) ("Coeur D'Alene").
[15] Id. at 9.

by the preemptive effect of IGRA, whereas the IGRA does not provide Coeur D'Alene's lottery with the specific intent of spreading player participation beyond the Reservation, nor does it provide the lottery with a "holder" to purchase the Class III lottery tickets. Thus, even under the rationale applied by the court in Coeur D'Alene, Class II Internet bingo is legal under IGRA because the holder achieves all elements of gaming on the Reservation in behalf of the player.

If you have any questions or comments, please do not hesitate to contact our office at (202) 543-5000. Thank you for your time and consideration.

TESTIMONY TO THE COMMITTEE ON INDIAN AFFAIRS

ERNIE STENSGAR, CHAIRMAN

COEUR D'ALENE TRIBE, A FEDERALLY RECOGNIZED INDIAN TRIBE

SUBMITTED JUNE 3, 1999

DEAR MR. CHAIRMAN AND COMMISSIONERS:

AS CHAIRMAN OF THE COEUR D'ALENE TRIBE AND PRESIDENT OF AFFILIATED TRIBES OF THE NORTHWEST, I REPRESENT MANY FAMILIES, THEIR OPPORTUNITIES AND THEIR FUTURE.

THE COEUR D'ALENE TRIBE IS A SMALL TRIBE IN NORTH IDAHO. ENCOMPASSING 340,000 GEOGRAPHIC ACRES UNDER OUR JURISDICTIONAL AUTHORITY. WE HAVE 1690 ENROLLED TRIBAL MEMBERS. WE HAVE A TRIBAL SCHOOL (K-8), TRIBAL COURT SYSTEM, POLICE DEPT., AND MANY PROGRAMS (SOME FEDERALLY FUNDED AND OTHER TRIBALLY SUPPORTED), TRIBAL GOVERNMENT, SOCIAL PROGRAMS, ECONOMIC DEVELOPMENT, EDUCATION, AND MANY OTHER PROGRAMS FOR THE COEUR D'ALENE TRIBE.

THE COEUR D'ALENE INDIAN TRIBE HAS ESTABLISHED NATIONAL INDIAN LOTTERY (NIL), AN AUTOMATED LOTTERY GAMING SITE ON THE INTERNET SINCE FEBRUARY OF 1997. THE AUTOMATION AND TECHNOLOGY IS ON INDIAN LAND WITHIN THE BOUNDARIES OF THE COEUR D'ALENE INDIAN RESERVATION. THE OPERATION HAS CREATED 30 JOBS IN A GROWING HIGH TECH INDUSTRY THAT REQUIRES COMPUTER

OPERATORS, PROGRAMMERS, ANALYSISTS, ENGINEERS AND CUSTOMER SERVICE REPRESENTATIVES.

S. 692 – THE INTERNET GAMBLING PROHIBITION ACT OF 1999 THREATENS THE CONTINUATION OF THE NATIONAL INDIAN LOTTERY. THEREFORE, ***THE COEUR D'ALENE TRIBE MUST IN FULL FAITH AND GOOD CONSCIENCE OPPOSE S. 692 IN ITS CURRENT FORM.*** SINCE STATE LOTTERIES ARE EXEMPT FROM THE PROVISIONS OF THE BILL, TRIBAL GAMING SHOULD ALSO BE EXEMPTED IN EQUAL RESPECT OF OUR TRIBAL SOVEREIGNTY, GOVERNMENTAL AUTHORITIES AND GENERAL RESPONSIBILITIES TO USE GAMING AS A TOOL TO FURTHER OUR COMMUNITY GOOD. IF SUCH LANGUAGE WERE INCLUDED, WE WOULD SUPPORT THE BILL.

WE DON'T UNDERSTAND WHY STATE LOTTERIES ARE EXEMPTED ALONG WITH HORSE RACING, OTB PARAMUTUEL WAGERING, FANTASY SPORTS AND OTHERS, WHILE TRIBAL GOVERNMENTS WITH THE MOST NOBLE OF PURPOSES ARE NOT. SINCE IT IS CLEAR THIS BILL, IF IT BECAME LAW, COULD NOT BE ENFORCED ON FOREIGN SOIL, AND BECAUSE EVERY OTHER SPONSOR OF GAMING IS EXEMPTED, IT SEEMS THAT THRIBAL GAMING IS THE ONLY ONE THAT THIS BILL AFFECTS. WE HAVE TO ASK ***WHY?*** ... ***SO SHOULD CONGRESS.***

THE COEUR D'ALENE TRIBE INTERNET LOTTERY, THE TRANSACTION AND THE GAMING OCCURS AT OUR FACILITY WHERE THE CALL IS RECEIVED ON OUR RESERVATION, AS REQUIRED BY THE INDIAN GAMING

REGULATORY ACT. THE CUSTOMER IS ONLY BUYING A LOTTERY TICKET SUBJECT TO RANDOM DRAWING AS REQUIRED BY OUR COMPACT WITH THE STATE OF IDAHO.

OUR COMPACT PROVIDES FOR THE CONDUCT OF A CLASS III LOTTERY, AMONG OTHER GAMES, INCLUDING INTERSTATE SALES. THE GOVERNOR OF THE STATE OF IDAHO AND THE UNITED STATES GOVERNMENT THROUGH THE SECRETARY OF INTERIOR APPROVED THIS COMPACT.

THE NIL HAS BUILT IN PROTECTIONS THAT PROHIBIT CUSTOMERS FROM SPENDING MORE THAN $500. PER MONTH, PROHIBIT UNDERAGED CHILDREN FROM ACCESSING OUR SITE, AND DONATES MONEY TO OTHER NON-GAMING TRIBES.

CUSTOMERS ACCESSING OUR SITE ON THE WORLD WIDE WEB, DIAL INTO OUR GAMES. WE RESTRICT VIA CREDIT CARD ANY PURCHASES OVER $500 PER MONTH. IT IS CONCEIVABLE THAT PERSONS WITH MORE THAN ONE CREDIT CARD COULD OPEN MULTIPLE ACCOUNTS, SO OUR SYSTEM VIA SOCIAL SECURITY NUMBER BLOCKS ANYONE ATTEMPTING TO OPEN MORE THAN ONE ACCOUNT. ALTHOUGH THE SYSTEM WILL ACCEPT HUSBAND AND WIFE USING TWO SEPARATE CREDIT CARDS UNDER TWO SEPARATE SOCIAL SECURITY NUMBERS, NO ONE UNDER 18 YEAR OF AGE IS ALLOWED TO PLAY. WE HAVE NOT HAD ANYONE UNDER 18 YEAR OF AGE ACTUALLY PLAY. ALTHOUGH THERE IS NO CLEAR LEGAL REASON NOT TO, WE RESPECT THOSE STATES WHO DO NOT PROVIDE FOR

LOTTERIES. THOSE STATES ARE BLOCKED OUT. IN OTHER WORDS, IF UTAH, FOR EXAMPLE, DOES NOT ALLOW LOTTERIES WITHIN THE CONFINES OF ITS BOUNDARIES, UTAH IS BLOCKED OUT AND PROSPECTIVE PLAYERSFORM UTAH CANNOT ACCESS THE SYSTEM.

SINCE BEGINNING INDIAN GAMING, WE HAVE DONATED OVER $1 MILLION DOLLARS TO THE LOCAL PUBLIC SCHOOLS. WE UNDERSTAND THAT COMPUTERS LABS HAVE BEEN ADDED AS A RESULT OF MONIES DONATED FROM INDIAN GAMING. WE HAVE COMMITTED 10% OF ALL LOTTERY NET PROFITS BE SHARED WITH TOWARD NON-GAMING TRIBES NATION-WIDE.

USING MODERN TECHNOLOGY WE ARE ON THE CUTTING EDGE OF THE LOTTERY INDUSTRY PROVIDING LOTTERY TICKETS VIA THE INTERNET IN A SYSTEM COMPARABLE TO ATM BANKING WHICH ALLOWS YOU TO ACCESS YOUR ACCOUNT FROM ANOTHER STATE. THIS KIND OF TECHNOLOGY AND SHOPPING OR ENTERTAINMENT IS BECOMING MORE AND MORE A PART OF AMERICAN LIFESTYLE: INTERNET SHOPPING, QVC TYPE CABLE TELEVISION STORES, MASS MARKETING PRODUCTS AND CONDUCTING SALES USING 800 NUMBERS AND CREDIT CARDS, INTERSTATE BANKING TANSACTIONS. IT HAS ALREADY BEEN ACCEPTED THAT ALL THESE TYPES OF PURCHASES OR TRANSACTIONS OCCUR WHERE THE CALL IS RECEIVED. AT THE BANK WHERE YOUR ACCOUNT IS (NOT IN THE STATE YOU MAY BE PHYSICALLY IN WHILE ACCESSING YOUR

ACCOUNT) OR AT THE STORE, BUSINESS OR WAREHOUSE WHERE YOUR CALL IS RECEIVED.

S. 692 THREATENS THE CONTINUATION OF THE NIL, THEREFORE, WE RESPECTFULLY ASK YOU, AS MEMBERS OF THE SENATE COMMITTEE ON INDIAN AFFAIRS TO SUPPORT OUR EFFORTS TO SECURE ECONOMIC DEVELOPMENT ON OUR RESERVATION. WE HAVE OUR OWN AMERICAN DREAM. WE INTEND TO SAHRE IT WITH OUR NEIGHBORS AND REGION.

WE ARE ON THE VERGE OF RESTORING OUR SELF-SUFFICIENCY. IT EXISTED FOR MANY THOUSANDS OF YEARS BEFORE THE LOSS OF OUR LAND BASE. WE WILL DO IT FOR OURSELVES. WE WILL DO IT FOR OUR REGION. WE WILL DO IT TO BENEFIT ALL THOSE INDIAN AND NON-INDIAN NEIGHBORS WHO APPRECIATE THE OPPORTUNITIES WE CREATE. OPPOSE S.692.

THANK YOU, MR. CHAIRMAN.

Summary of Argument

Excerpted from US Court of Appeals for the 9th Court
Submitted by the Coeur d'Alene Tribe
As part of Testimony for Committee on Indian Affairs

ATTACHMENT ..... A

VII. SUMMARY OF ARGUMENT

Excerpted from the US Court of Appeals for the 9th Court
Submitted by the Coeur d'Alene Tribe
With a Report for the Senate Committee on Indian Affairs
June 9, 1999

The district court erred by concluding that IGRA is unambiguous in requiring a person to be physically present on the Tribe's reservation when he authorizes a deduction from his account to buy a chance in the NIL, and that the NIL was not conducted on Indian lands because the purchaser of chances might authorize such a deduction by telephone from outside the reservation.

First, IGRA does not require that the purchaser be physically present on the reservation. Congress neither addressed that issue nor defined the terms used in IGRA to create such a requirement. Moreover, by exempting Indian tribes from the federal anti-lottery statutes, Congress made clear that every aspect of Indian lotteries need not be confined to reservations. Accordingly, the court erred by concluding that IGRA was unambiguous and failing to interpret the statute in a manner favorable to Indian Tribes.

Second, the conditions and requirements a tribe must satisfy to conduct class III gaming are clearly set forth in IGRA. None of those conditions or requirements concerns the location of the purchaser of chances

in an Indian lottery. In view of the fact that Congress expressly exempted Indian lotteries from the federal anti-lottery statues, no such condition or requirement can be read into the statute. Every legally essential element of the NIL takes place on its reservation. Accordingly, the court erred by concluding that the NIL is not conducted on Indian lands within the meaning of IGRA.

Third, the court erred by refusing to defer to the NIGC's interpretation of IGRA. Given the ambiguity of IGRA on the relevant issue, the court was required to defer to the interpretation of the federal agency charged with administering the statute. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837-43 (1984).

Fourth, the Tribe obtained every necessary regulatory approval for its game from the NIGC, and because those approvals conclusively determine the lawfulness of the approved activity, they can be properly challenged only through direct appeal of the agency decisions. See *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 421-22 (1965). By accepting the invitation of *amici curiae* to engage in a collateral review of the agency's determination that the NIL was lawful, the court committed reversible error.

Letter from National Indian Gaming Commission

Opinion from NIGC that Lottery is Legal

ATTACHMENT ..... B

NATIONAL
INDIAN
GAMING
COMMISSION

SEP 21 1995

John Fraser, Esq.
Assistant General Counsel
Office of the General Counsel
NIGC
1133 19th Street, NW
Washington, D.C. 20036

Dear Mr. Fraser:

Thank you for your letter of July 27, 1995, concerning the Coeur d' Alene Tribe of Idaho's proposed national lottery. I apologize for the delay in responding to your letter.

You have asked whether the proposed lottery is, in the opinion of the National Indian Gaming Commission (NIGC), lawful under applicable federal laws. The NIGC is only qualified to render an opinion on the legality of the proposed lottery under the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 et seq. (IGRA).

In the view of the NIGC, the Tribe has complied with all the requirements of the IGRA and the regulations of the NIGC with respect to its lottery proposal. Because a lottery is a class III game, the Tribe entered into the required compact with the State of Idaho, and that compact was approved by the Secretary of the Interior. In addition, the Chairman of the NIGC approved the Tribe's gaming ordinance as required by the IGRA. Finally, the Chairman approved a management contract between the Tribe and Unistar Entertainment, Inc. to conduct the tribal lottery.

In the opinion of the NIGC, the Tribe's lottery proposal, which involves customers purchasing lottery tickets with a credit card both in person and by telephone from locations both inside and outside the State of Idaho, is not prohibited by the IGRA.

I hope this responds to your concerns.

Sincerely,

Harold A. Monteau
Chairman

Status of Litigation

Cases currently under litigation

ATTACHMENT C

GIVENS, FUNKE & WORK
ATTORNEYS AT LAW
TOP FLOOR - OLD CITY HALL
424 SHERMAN AVE. P.O. BOX 969
COEUR D'ALENE, IDAHO 83816-0969
(208) 667-5486
FAX (208) 667-4695

June 4, 1999

Ernest Stensgar, Chairman
Coeur d'Alene Tribe
850 "A" Street
P.O. Box 408
Plummer, ID 83851

RE: Status of gaming litigation

Dear Mr. Chairman:

The Coeur d'Alene Tribe (Tribe) is involved in several lawsuits regarding the National Indian Lottery (NIL). Set out below is a short summary of the current status of each suit by state.

Idaho - Telephone Lottery - 9th Circuit.

This case concerns the telephone NIL. AT&T refused to provide 1-800 telephone service to the Tribe for the NIL. The Tribe sued AT&T in Tribal Court and won. AT&T appealed and the Tribe won again. AT&T then sued in Federal Court and AT&T won. The federal judge held part of the NIL was not conducted "on Indian lands" as required by IGRA. The Tribe appealed to the 9th Circuit. The NIL has been discontinued during the appeal. The appeal is partially briefed. Oral argument is expected in early 2000. A major exhibit in the case is the attached letter from the Chairman of the NIGC stating that the telephone NIL complies with IGRA which requires gaming be conducted "on Indian lands".

Missouri - Internet Lotter - U.S. District Court/U.S. Supreme Court

This case concerns the internet NIL. Missouri sued the Tribe, tribal officials and management contractor (Tribe) in two separate actions in State Court, claiming violations of state law. The cases were removed to Federal Court. The Tribe won initial victories and Missouri appealed. The 8th Circuit remanded the case to the Federal District Court to decide if the NIL was conducted "on Indian lands". If not, the cases are to be remanded back to State Court. The Federal District Court has set a hearing on this issue for late July, 1999, although the Tribe has requested this hearing be vacated. The Tribe has filed a Petition for Certiorari (request to accept

appeal) in the case with the United States Supreme Court. That request, and an additional motion, ask that the 8th Circuit decision be reversed on various procedural grounds. A decision on the Motion is expected by late June. A decision on whether to accept the appeal is expected by October. If the appeal is accepted, a decision from the United States Supreme Court is expected in a year.

Wisconsin - Internet Lottery - 7th Circuit

This case involves the internet NIL. Wisconsin sued the Tribe and its management contractor in State Court claiming violations of state law. The case was removed to Federal Court. The Tribe was dismissed on sovereign immunity grounds, but the management contractor was not. The case was appealed. A settlement has been reached that will dismiss Wisconsin's suit and establish a procedure regarding reactivation of the NIL if the Tribe prevails on the "on Indian lands" issue in other litigation.

This summary is very brief and may result in additional questions. If so, more detailed information can be easily provided.

Sincerely,

Raymond C. Givens

RCG/sr

Compact between State of Idaho and Coeur d'Alene Tribe

ATTACHMENT ..... D

1992 CLASS III GAMING COMPACT

* * *

By and Between

THE COEUR D'ALENE TRIBE

and

THE STATE OF IDAHO

1992 CLASS III GAMING COMPACT

By and Between the
COEUR D'ALENE TRIBE
and the
STATE OF IDAHO

This Tribal-State Compact is made and entered into by and between the Coeur d'Alene Tribe ("Tribe"), a federally recognized Indian Tribe, and the State of Idaho ("State") pursuant to the provisions of the Indian Gaming Regulatory Act. Pub. L. 100-497, 102 Stat. 2425, codified at 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. §§ 1166-1168 (the "Act"). Whereby, the parties herein do promise, covenant and agree as follows:

ARTICLE 1. TITLE

These Articles of Compact collectively comprise, and may be cited as, "The 1992 Class III Gaming Compact By and Between The Coeur d'Alene Tribe And The State Of Idaho" or the "Compact."

ARTICLE 2. RECITALS

2.1 The Tribe and the State recognize and respect the laws and authority of the respective sovereigns.

2.2 On April 15, 1992, the Tribe, acting in accordance with the Act, filed a request with the State to enter into negotiations for the purpose of negotiating and entering into a Tribal-State Compact governing the conduct of the Tribe's Class III gaming activities.

2.3 The Tribe intends through this Compact to enhance the economic development of the Tribe, provide employment to their citizens, maintain public confidence and trust that gaming by the Tribe is conducted honestly, competitively, and free from criminal and corrupt influences, and to otherwise govern the conduct and operation of gaming in furtherance of the public interest of the Tribe and the State.

2.4 In the spirit of cooperation, the parties hereby set forth in joint effort to implement the terms of this Compact in good faith.

2.5 The parties recognize that gaming may provide positive financial impacts to the Tribe. The Tribe may utilize gaming-generated financial resources to fund programs that provide vital services to Tribal citizens. These programs may include education, health and human resources, housing, road construction and maintenance, sewer and water projects, economic development and self-sufficiency.

2.6 The Tribe, through this Compact and the regulations provided for herein, shall attempt in good faith to address the legitimate and common concerns of both parties.

2.7 The parties deem it in their respective best interests to enter into this Compact.

ARTICLE 3. PURPOSE

The purposes of this Compact are:

3.1 To assure that the Tribe is the primary beneficiary of the gaming operation;

3.2 To protect the health, welfare, and safety of the public;

3.3 To assure that the profits derived from Class III gaming are accurately reported, are transferred to the rightful parties and are used for the purposes intended;

3.4 To assure that expenses of Class III gaming are legitimately incurred and accurately reflect the value of the property obtained or the services rendered;

3.5 To assure honesty and financial integrity of all activities conducted;

3.6 To assure that Class III gaming is completely and fairly regulated on an on-going basis;

3.7 To deter crime or the potential for any crime to occur and to shield any such gaming activity from any involvement by organized crime or other corrupting influences;

3.8 To protect, preserve, and enhance the economic and general welfare of the public and the citizens of both the Tribe and the State;

3.9 To enhance and further develop the official government-to-government relationship between the Tribe and the State and to mutually recognize and re-emphasize the governmental powers of each of them.

ARTICLE 4. DEFINITIONS

For purposes of this Compact:

4.1 "Act" means the federal Indian Gaming Regulatory Act, Pub. L. 100-497, 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. §§ 1166-68.

4.2 "Board" or "Charitable Gaming Board" means the Coeur d'Alene Tribal Charitable Gaming Board, the single Tribal agency primarily responsible for regulatory oversight of Class III gaming as authorized in this Compact.

4.3 "Class III gaming" means that type of gaming defined in Section 4(8) of the Act, 25 U.S.C. § 2703(8).

4.4 "Gaming code" means the laws, rules and regulations adopted by the Tribe as amended from time to time governing gaming activities at Tribal gaming facilities.

4.5 "Gaming employee" means any natural person employed in the operation or management of the gaming operation, whether employed by the Tribe or by any enterprise providing onsite services to the Tribe within the gaming facility, excluding persons providing maintenance, janitorial or other such ancillary non-gaming services.

4.6 "Gaming facility" or "gaming facilities" means all buildings, improvements and facilities used or maintained in connection with the conduct of Class III gaming on Indian lands as authorized by this Compact.

4.7 "Gaming operation" means the gaming enterprise owned by the Tribe on Indian lands for the conduct of Class III gaming.

4.8 "Governor" means the Governor of the State of Idaho.

4.9 "Indian lands" means Indian lands as defined in the Act, as well as lands within the State which meet the requirements of 25 U.S.C. § 2719. The determination of whether the beds, banks, and waters of navigable watercourses within the Coeur d'Alene Reservation constitute

Indian lands shall be governed by the outcome in Coeur d'Alene Tribe *et al.* v. State of Idaho, USDC #CIV91-0437-N-HLR, or other federal court decision.

4.10 "License" means an approval or certification issued by the Board to any natural person or enterprise to be involved in the gaming operation or in the providing of gaming services to the gaming operation.

4.11 "Licensee" means any natural person or enterprise that has been approved and licensed by the Board to be involved in the gaming operation or in the providing of gaming services in the gaming operation.

4.12 "Management Contract" means a contract for the development and management of a Class III gaming operation, as provided in Article 9 of this Compact, and approved pursuant to the Act.

4.13 "Management Contractor" means any person, corporation or entity that enters into a development and management contract with the Tribe pursuant to Article 9 of this Compact.

4.14 "Off-track pari-mutuel wager" means a wager placed by a patron and accepted by the gaming operation's pari-mutuel book on a race or races offered as part of an interstate or intrastate common pari-mutuel pool, whether or not the wager is actually included in the total amount of such wagering pool.

4.15 "Pari-mutuel" means a system of wagering on a race or sporting event whereby the winners divide the total amount

wagered, in proportion to the amount individually wagered, after deducting commissions, fees and taxes.

4.16 "Regulations" means the gaming regulations promulgated by the Tribe pursuant to this Compact.

4.17 "State" means the State of Idaho, its authorized officials, agents and representatives.

4.18 "State gaming agency" means the Idaho agency designated by the Governor by written notice to the Tribe as the single state agency primarily responsible for oversight of Class III gaming as authorized by this Compact.

4.19 "State lottery" means;

.1 The scratch-off game in which a player purchases a paper ticket that has groupings of numbers or symbols that are covered with a material that can be scratched off, thereby exposing the numbers or symbols. The player wins a prize if his ticket contains a pre-set combination of numbers or symbols; and

.2 The numbers game commonly known as lotto in which a player purchases a paper ticket containing a series of numbers (often 5, 6 or 7 numbers) and wins a prize if all or some of these numbers are selected at a random drawing; and

.3 The pull-tab game in which a player purchases a paper product that, when pulled apart, reveals a grouping of numbers or symbols. A player wins a prize if his ticket contains a pre-set combination of numbers or symbols; and

.4 Any other type of game that the State hereafter conducts as a lottery game.

4.20 "Track" means an in-state or out-of-state facility licensed to operate horse or other racing where pari-mutuel wagering on races is conducted.

4.21 "Tribal Council" means the Coeur d'Alene Tribal Council which possess all governmental authority of the Coeur d'Alene Tribe.

4.22 "Tribal law enforcement agency" means the police force of the Tribe, established and maintained by the Tribe, pursuant to the Tribe's powers of self-government, to carry out law enforcement on Indian lands.

4.23 "Tribe" means the Coeur d'Alene Tribe of Indians, its authorized officials, agents and representatives.

ARTICLE 5. PARTIES AND AUTHORITY

5.1 The Governor has authority to execute this Compact on behalf of the State pursuant to Idaho Constitution, art. IV, sec. 5, and Idaho Code §§ 67-802 and 67-4002.

5.2 The Coeur d'Alene Tribal Council has authority to execute this Compact on behalf of the Tribe pursuant to:

.1 The sovereign powers of the Tribe as well as Tribal/federal agreements and executive orders; and

.2 Article VII, Section 1(a) of the Tribe's 1947 Constitution and ByLaws, as amended.

ARTICLE 6. AUTHORIZED CLASS III GAMING

6.1 Disputed Issues. The parties have been unable to agree upon the types of Class III games permitted by the Act to be

played by the Tribe and whether restrictions on the scale of operations are allowed under the Act.

.1 The State takes the following positions:

a) Types of Games. Under the applicable laws of the State before and after passage of HJR 4 (1992), the Act permits only state lottery, pari-mutuel betting on racing, and the simulcast thereof as authorized Class III games in Idaho.

b) Restrictions. The Act permits the State to negotiate reasonable restrictions and requirements for the conduct and operation of gaming in furtherance of the public interest, including negotiated limits upon the scale of operations of other Class III games, should they be allowed.

.2 The Tribe takes the following positions:

a) Types of Games. Under either Section 20, Article III, of the Idaho Constitution and the applicable Laws of the State or the amendment to Section 20, Article III, of the Idaho State Constitution by HJR 4, 51st Idaho Leg. Special Session (1992), the Act permits the Tribe to engage in all games that contain the elements of chance and or skill, prize and consideration.

b) Restrictions. The Act prohibits a state from imposing restrictions on the scale of operation of allowable games which reduce either the revenue to the Tribe, or the potential for Tribal economic

development. Scale of operation restrictions include state-imposed limits on the number of gaming machines and gaming tables as well as limits on the size of prizes and bets.

.3 Both the Tribe and the State acknowledge that these legal issues should be resolved and concluded. In recognition of this, the Tribe and the State agree in this Compact to resolve issues that can be agreed upon and agree to establish a process for resolving the disputed matters.

6.2 Gaming Authorized. Following approval of this Compact as provided in the Act, the Tribe may operate in its gaming facilities located on Indian lands the following types of games.

.1 Lottery: those lottery games defined as "State lottery" in Article 4.19.

.2 Pari-mutuel betting:

a) on the racing of horses;

b) on the racing of dogs;

c) on the racing of mules; and

d) on the simulcast of a, b, or c.

.3 Any additional type of game involving chance and/or skill, prize and consideration that may hereafter be authorized to be conducted in the State.

6.3 No Restrictions on Authorized Gaming. Except as otherwise provided in this Compact, gaming authorized in Article 6.2.1 and 6.2.2 shall not be subject to any State restrictions,

including the Tribe's advertising or promotion of the authorized games or any intrastate or interstate aspects of the permitted games. Provided, this section is not intended to permit gaming except on Indian lands as defined in Article 4.9.

6.4 Judicial Remedy. The Tribe and the State agree that the ultimate issues of what gaming the Tribe may conduct under the Act and what restrictions on the operations, if any, may be imposed, are ultimately questions of law.

.1 It is the Tribe's position that the Act has vested exclusive jurisdiction in the United States District Courts to resolve disputes under the Act.

.2 The State does not consent to jurisdiction of the federal court over any claim under the Act. However, the Tribe and the State agree that, in lieu of a "bad faith" claim under the Act, either party may file suit for declaratory judgment in the United States District Court for the District of Idaho naming the other as a defendant and seeking a declaration of the legal issues disputed in this Article 6. Both parties agree to seek the necessary legal authority, merge declaratory judgment actions, or take other steps as may be necessary to participate in such an action on its merits. This agreement shall not in any way prejudice any right to appeal or seek review of any judgment.

.3 The parties agree to expedite any appeal or review of any final order or judgment entered in such declaratory judgment action.

6.5 Post Declaratory Judgment. Upon the conclusion of all legal proceedings in a declaratory judgment action brought pursuant to Article 6.4, including the conclusion of all appeals or review, the appropriate provisions below shall apply:

.1 In the event the court(s) determines that no additional types of games are permitted in Idaho under the Act, the Tribe's gaming shall be limited to the gaming authorized in Article 6.2.

.2 In the event the court(s) determines that additional types of games are permitted in Idaho under the Act, the Tribe may conduct such games as are consistent with that judgment upon conclusion of negotiations and/or arbitration as provided for in Article 6.6.1.

6.6 Post Declaratory Judgment--Procedure.

.1 Upon the conclusion of all legal proceedings in a declaratory judgment action brought pursuant to Article 6.4, including the conclusion of all appeals or review, and in the event additional types of games are permitted in Idaho pursuant to such declaratory judgment action, the parties agree to expedited negotiation of any issues which are proper subjects of negotiation under the Act consistent with the judicial resolution. Such issues shall be negotiated for thirty

(30) days. For purposes of this section, "day" shall mean calendar day. If agreement cannot be reached, such issues shall be submitted to binding arbitration in accordance with this Article. Either party shall serve written notice of intent to arbitrate on the other party on the final day of negotiation. Both parties shall immediately identify a list of five (5) names of individuals available as prospective arbitrators. Each party shall, within five (5) days of notice of intent to arbitrate, select a person from the list of the other party as an arbitrator. Within ten (10) days, these two individuals shall select a third arbitrator from a list of not less than five (5) nominees from an independent arbitrators' or alternative dispute resolution organization. The State and the Tribe agree that, from the date of the selection of arbitrators, the arbitration process shall be expedited to permit its completion within ninety (90) days. The arbitrators shall be required to submit their decision within said ninety (90) day period. The arbitrators shall have authority to issue such orders and decisions as shall be reasonably necessary or desirable to bring about an expeditious decision. The Tribe agrees not to conduct games pursuant to Article 6.5.2 until the completion of arbitration. However, if conclusion of the arbitration process is delayed for any reason, the arbitrators may permit gaming on such

terms as they determine pending conclusion of arbitration. Arbitration expenses will be billed equally to the respective parties. No judicial review of an arbitration decision will be permitted. Arbitration decisions shall have the same effect as if a part of this Compact, incorporated in full herein.

.2 To ensure integrity, the Tribe agrees that if additional games are permitted pursuant to the declaratory judgment, such games shall be conducted in accordance with the operational, security, cash control and other standards established in this Compact together with additional negotiated standards as restrictive as those of the Nevada Gaming Commission for that particular game. Such restrictions shall be negotiated and/or arbitrated in the manner provided in Article 6.6.1.

6.7 **Post Compact Meetings**

The Tribe and the State agree to meet every six (6) months in an effort to enhance good relations and to facilitate the orderly operation of the matters addressed in this Compact. The first such meeting shall take place not later than April, 1993.

ARTICLE 7. REGULATION OPERATION AND MANAGEMENT OF GAMING

The Tribal Council shall regulate, operate and manage authorized Class III gaming in accordance with the terms of this Compact, the Gaming Code and regulations. The Tribal Council shall take legislative action adopting the terms of this Compact and

regulations into Tribal Law. The Tribal Council may adopt, amend or repeal such regulations or codes, consistent with the policy, objectives, purposes and terms of this Compact.

ARTICLE 8. TRIBAL GAMING BOARD

8.1 The Tribe, through its Tribal Council, shall have sole proprietary interest in and ultimate responsibility for the conduct of all gaming conducted by the Tribe. Consistent with this Compact, the Tribal Council shall determine the type of Class III gaming authorized and retain responsibility for entering into management contracts or the selection of gaming operators.

8.2 The Tribal Council shall establish the Tribal Charitable Gaming Board. The Board shall consist of five (5) members with staggered three (3) year terms, appointed by and under the direct authority of the Tribal Council. Board members may be removed for cause. The Board shall be composed of not less than three (3) Tribal members of which at least one shall also be a member of the Tribal Council. Members of the Board and their immediate family members shall not have any financial interest in the gaming regulated by the Board or in any business supplying equipment or services for such Class III gaming activities. Any Board member shall not consider any matter before the Board involving immediate family members. "Immediate family member" as used in this Article means a Board member's spouse or the father, mother, brother, sister, grandparent, and child or stepchild of a Board member.

8.3 The Board shall have exclusive jurisdiction over the regulation and supervision of all authorized Class III gaming. The Board shall the have powers and duties as prescribed by the Tribal Council which shall be exercised consistently with the Act and this Compact, including the following:

.1 Propose regulations, rules and bylaws consistent with the Act, Gaming Code and this Compact for the operation and management of all Class III gaming and facilities.

.2 Adopt standards for and issue licenses to Class III gaming facilities and operations which require licensing.

.3 To enter all gaming offices, facilities or other places of business to determine compliance with this Compact, Gaming Code, regulations and other applicable law.

.4 Conduct investigations of alleged violations of this Compact, the Gaming Code, regulations and other applicable law.

.5 Take appropriate disciplinary action for violations of this Compact, Gaming Code or regulations, including the assessment of fines, or the conditioning, suspending or revocation of licenses or to institute appropriate legal action for enforcement or both.

.6 Provide for adequate security at all authorized gaming facilities.

.7 Determine appropriate methods for receipt of gaming revenue, specification of payouts and disbursements as provided in this Compact.

.8 Shut down or confiscate all equipment and gaming supplies failing to conform to required standards or regulations.

.9 Perform all other acts reasonably necessary to fulfill the purpose and execute the provisions of this Compact, the Charitable Gaming Code and regulations.

8.4 Prior to appointing the Board the Tribal Council shall conduct a background investigation of the proposed Board which shall meet the requirements for Management Contractor background investigations set forth in Article 10.

ARTICLE 9. MANAGEMENT CONTRACTOR

9.1 The Tribe may enter into management contracts for the development and management of gaming authorized by and consistent with this Compact and in accord with regulations, the Act and the Gaming Code. The management contract shall be submitted to the Bureau of Indian Affairs or the Chairman of the National Indian Gaming Commission for approval. The Tribal Council shall not allow a management contractor to operate gaming authorized by this Compact if the Bureau of Indian Affairs or the Chairman of the National Indian Gaming Commission has disapproved the Management contractor or management contract.

9.2 The Board shall submit copies of the proposed management contract to the State together with the completed background

investigation, concurrent with submission to the National Indian Gaming Commission. The State may submit its views regarding approval of such contract to the Board, the Bureau of Indian Affairs or the National Indian Gaming Commission.

ARTICLE 10. LICENSING REQUIREMENTS

10.1 The Board shall be responsible for issuing the necessary facility or personal licenses.

10.2 All gaming employees shall be licensed by the Board. Such licenses are privileges which shall be granted and shall remain in effect only if the applicant establishes to the satisfaction of the Board that the applicant clearly meets all licensing requirements. The Board shall promulgate specific licensing requirements for gaming employee applicants which shall include at least the following mandatory minimum requirements. The applicant must:

.1 be at least 18 years of age, unless Tribal or State liquor regulations require otherwise;

.2 be of good moral character;

.3 possess creditworthiness and integrity in past financial transactions;

.4 not have been convicted of an offense related to gambling, fraud, misrepresentation or deception, drugs, or a felony within the past ten (10) years;

.5 not be a person whose prior activities, reputation or associations pose a threat to the public interest, or the effective regulation of gaming, or create or enhance the danger of unsuitable, unfair, or illegal

practices or methods or activities in the conduct of gaming;

.6 not be employed in any capacity which would create a conflict of interest between the applicant and the gaming operation;

.7 not have had a gaming license denied, suspended or revoked by any State or Tribe;

.8 be trainable or qualified to perform the duties required.

The Board shall consider the experience, character, and general fitness of the applicant and the veracity and completeness of the information submitted with the application.

10.3 Failure to satisfy any of the foregoing requirements shall render the applicant ineligible to manage, operate or participate in gaming operations.

10.4 The Board shall revoke an existing license upon the happening of any event which would have rendered the licensee ineligible for the license at the time of application or upon the failure of a licensee at any time to satisfy the Board that the licensee meets all requirements. For this purpose, the Board may require a licensee to be reconsidered at any time. A license shall be revoked if the licensee is in violation of this Compact, regulations or directives of the Board.

10.5 Any applicant seeking a license shall first submit to a background check to be conducted by the Board or its

designee to ensure that applicants are eligible for a license. The Board may issue a temporary license for a period of three (3) months pending completion of the background investigation for all individuals except the management contractor.

10.6 If a management contractor is used by the Tribe, the Board shall conduct a thorough background investigation of the management contractor prior to issuing a permanent or temporary license.

10.7 Background investigations of primary management officials and key employees shall be as thorough as investigations performed upon management contractors.

10.8 Background investigations may be conducted by Tribal law enforcement personnel, BIA police, the Federal Bureau of Investigation, or the State as may be agreed to by the Tribe and such entity. The gaming operation shall obtain sufficient information and identification from the applicant on forms to be furnished by the Board to permit a thorough background investigation together with such fees as may be required by the State and the Tribe. The information obtained shall include, at a minimum, name (including any aliases), current address, date and place of birth, criminal arrest and conviction record, Social Security number, two sets of fingerprints, sex, height, weight, and two current photographs. This information shall be provided in writing to the designated agency which shall conduct the background

investigation and the provide a written report to the Board and the State gaming agency regarding each application.

10.9 The Tribe shall retain the right to conduct such additional background investigations of any gaming employee at any time during the term of that person's employment. At any time, any gaming employee who does not establish that he or she satisfies all of the criteria set forth above shall be dismissed.

ARTICLE 11. SECURITY

11.1 Each gaming operator shall be required to employ an adequate security force and shall submit a security plan to the Board for its approval. The gaming operator shall file a written report with the Board detailing any incident in which an employee or patron or other person is suspected of violating a provision of this Compact, the Gaming Code or regulations within (24) twenty-four hours of its occurrence.

11.2 The Board shall require gaming operators to employ security and surveillance standards at least as stringent as those set forth in Appendix A. The Board may adopt stricter standards which shall be provided to the State.

11.3 The Board shall have access to all or any part of the security system or its signal at all times.

ARTICLE 12. OPERATIONAL REQUIREMENTS

All authorized Class III gaming shall be conducted in accordance with this Compact including the operational requirements set forth in Appendix B. The Board may adopt stricter standards

which shall be provided to the State within fourteen (14) days of their adoption.

ARTICLE 13. ACCOUNTING AND CASH CONTROLS

The Board shall require gaming operators to employ accounting and cash control procedures at least as stringent as those contained in Appendix C of this Compact. These control procedures may be modified by mutual agreement of the parties.

ARTICLE 14. AUDITS

14.1 The Tribe shall undertake an independent audit of all books, records, gaming and cash control procedures of all authorized Class III gaming activities at least once in each fiscal year. Such audit shall be conducted by an independent certified public accountant with experience in auditing gaming operations. The audit shall include review of all records necessary to ensure compliance with this Compact, the Gaming Code, and regulations. All audits shall conform to applicable American Institute of Certified Public Accountants standards. Consistent with Article 17.3, the Tribe shall provide copies of such audits to the State within (30) thirty days of receipt by the Tribe. The State may conduct a review of such audit to ensure compliance with this Compact and the integrity of the Tribe's gaming operations. This review may include consultation with the certified public accountant to ensure proper auditing procedures and methods were employed in a manner sufficient to assure compliance with this Compact, the Gaming Code and regulations.

14.2 In the event the State disputes the sufficiency of the accounting and audit practices utilized by the Tribe pursuant to this Compact, the State shall inform the Tribe of its concerns and, if adequate assurance of compliance with the State's request is not given, the matter may be resolved pursuant to Article 21.

ARTICLE 15. STATE ENFORCEMENT OF COMPACT PROVISIONS

15.1 The State gaming agency, pursuant to the provisions of this Compact, shall have the authority to monitor Class III gaming operations to ensure compliance with the provisions of this Compact, the Gaming Code and regulations. In order to provide for proper monitoring of gaming operations, agents of the State gaming agency previously identified as such in writing to the Board shall have unrestricted access to all areas of Class III gaming facilities during normal operating hours without notice; provided, however, that the monitoring activities of these agents shall be in the presence of one member of the Board and/or gaming manager and shall not interfere with the normal functioning of the gaming operation. Said agent shall provide proper identification to the Tribe.

15.2 At the completion of any inspection or investigation by the State gaming agency, copies of the inspection or preliminary investigative report shall be forwarded to the Board within five (5) working days of its completion.

ARTICLE 16. REPORTING

The Tribe shall provide the State gaming agency with a copy of its current Gaming Code, regulations and amendments thereto, audit reports conducted pursuant to Article 14, results of all equipment tests, management contracts, background investigation results, information regarding violations of this Compact or regulations including completed investigative reports and final dispositions. All copies shall be provided to the State within a reasonable time but no later than (60) sixty days after receipt by the Tribe.

ARTICLE 17. PRIVILEGES AND CONFIDENTIALITY

17.1 All financial information, proprietary concepts, ideas, plans, methods, data, developments, inventions or other proprietary information regarding the gaming operations of the Tribe shall be deemed confidential and proprietary information of the Tribe and shall be protected from third party or public disclosure without the express written approval of the Tribe, or unless it is subpoenaed in connection with a judicial or administrative proceeding, or pursuant to court order.

17.2 In the event any person, entity, or government requests confidential information as described in Article 16.1 by judicial process or otherwise, the State shall immediately notify the Tribe and provide copies of all such requests to the Tribe, as well as allow the Tribe sufficient time to respond to such requests.

17.3 It is the parties' understanding that all records provided to the State by the Tribe under this Compact shall be exempt from public disclosure pursuant to Idaho Code §9-340(2) and (5) and Idaho Code §9-203(5). In the event it is determined by court order that the records are not exempt from public disclosure, the State shall thereafter have the right to inspect but not copy records subject to disclosure.

17.4 The Tribe shall have the right to inspect and copy all State records concerning the Tribe's Class III gaming other than records protected by State law.

ARTICLE 18. JURISDICTION

18.1 The Tribe shall be responsible for addressing and solving all law enforcement problems arising from its Class III gaming activities on Indian lands. Whenever the Tribe has reason to believe that any person or entity has violated this Compact, the regulations, the Charitable Gaming Code or other law applicable to a Class III gaming activity, the Tribe shall request that appropriate law enforcement authorities investigate the violation.

18.2 The Tribe shall have exclusive civil jurisdiction over all civil matters or disputes relating to or arising from gaming conducted pursuant to this Compact to the extent permitted by federal law.

18.3 The Tribe shall exercise exclusive criminal jurisdiction over Indians.

18.4 In enforcing the terms and provisions of this Compact, the State shall exercise criminal jurisdiction over non-Indians.

The State and the Tribe, to the extent permitted by law, agree to enter into such cross-deputization agreements as may be necessary and proper to facilitate cooperation between State and Tribal law enforcement personnel. The State will encourage local agreements with the Tribe.

18.5 Nothing contained herein shall be deemed to modify or limit existing federal criminal jurisdiction over the gaming operation authorized under this Compact.

18.6 Both the Tribe and State and their respective agencies and instrumentalities shall have the power to arrest on Indian lands in Idaho and to detain any person whatsoever for any suspected violation of this Compact, or any law, rule or regulation of any governmental authority respecting gaming on Indian lands. Upon identification of the appropriate authority under this Compact for the prosecution of such suspected offense, the arresting governmental sovereign shall release such detained person to the custody of the sovereign or sovereigns which are empowered to prosecute the suspected offender under this Compact, applicable law, rule or regulation.

18.7 The jurisdiction held by the State does not obligate the State to take any action on Indian lands pursuant to its jurisdiction. The jurisdiction held by the State shall not be construed as creating an obligation between the State and the Tribe or between the State and any third party which would require the State to exercise its jurisdiction on Indian lands.

ARTICLE 19. TAXATION

19.1 Except as provided in Article 20, nothing in this Compact shall be deemed to authorize the State or any political subdivision thereof to impose any tax, fee, charge or assessment upon the Tribe or the gaming operation. Nothing in this Compact shall authorize or permit the collection and payment of any Idaho tax or contribution in lieu of taxes or fees on or measured by gaming transactions, gaming devices permitted under this Compact, gross or net gaming revenues, or the Tribe's net income.

19.2 Nothing in this Article is intended to affect the State's right to tax income as permitted by law.

ARTICLE 20. PAYMENT AND REIMBURSEMENTS

20.1 The gaming operation shall compensate the State for actual expenses reasonably incurred relating to any background investigations conducted by the State at the request of the Tribe. Fees payable under this Article shall be in accordance with the State fee schedule and be the same as the costs to the State for conducting similar background investigations for its Class III gaming operations. The fees shall be paid at the time a criminal background investigation is requested.

20.2 The gaming operation shall contribute five percent (5%) of net revenues from authorized Class III gaming for the financial support of education. This sum is to be divided equally between Tribal and public education in the region on or near the Reservation. The Tribe may elect to contribute

additional sums for these or other educational purposes. Disbursements of these funds shall be at the sole discretion of the Tribe.

ARTICLE 21. DISPUTE RESOLUTION

21.1 This section controls resolution of all disputes other than those expressly provided for in Article 6. Resolution of such Article 6 disputes shall be governed solely by the dispute resolution provisions of Article 6.

21.2 Except as provided in Article 6, if either party believes that the other party has failed to comply with any requirement of this Compact, it shall invoke the following procedure:

.1 The party asserting the non-compliance shall serve written notice on the other party. The notice shall identify the specific statutory, regulatory or Compact provision alleged to have been violated and shall specify the factual basis for the alleged non-compliance. The State and the Tribe shall thereafter meet within ten (10) working days in an effort to resolve the dispute.

.2 If the dispute is not resolved to the satisfaction of the parties within sixty (60) days after service of the notice set forth in Article 21.2.1, either party may pursue binding arbitration to enforce or resolve disputes concerning the provisions of this Compact.

21.3 Except as provided in Article 6, both parties consent to binding arbitration as provided herein. Once a party has

given notice of intent to pursue binding arbitration and the notice has been sent to the non-complaining party, the matter in controversy may not be litigated in court proceedings. A panel of three (3) arbitrators shall be selected by the American Arbitration Association. The arbitrators may declare the parties' rights under the terms of this Compact and grant relief permitted by law. An arbitration decision shall be made within one hundred twenty (120) days of the selection of the arbitrators unless extended by the arbitrators. Arbitrators shall have the power to issue orders and decisions as may be necessary to enforce participation by the parties and as may be necessary or desirable to bring about an expeditious and reasonable decision. The arbitrators shall bill their fees equally to the respective parties. No former or present employee of the State, Tribal member, or former or present Tribal employee may be designated as an arbitrator. No judicial review of an arbitration decision will be permitted. The parties may, by written agreement, permit a decision by a single arbitrator. Arbitration decisions shall have the same effect as if a part of this Compact, incorporated in full herein.

21.4 Nothing in this Article 21 shall be construed to preclude, limit or restrict the ability of the parties to pursue, by mutual agreement, alternative methods of dispute resolution, whether binding or non-binding, including, but not limited to, arbitration, mediation, mini-trials or judicial

resolution firms; provided, however, that neither party is under any obligation to agree to such alternative methods of dispute resolution.

ARTICLE 22. RESERVATION OF RIGHTS

22.1 Nothing in this Compact shall be deemed to affect the operation by the Tribe of any Class II gaming as defined in the Act, whether conducted within or without the gaming facility or gaming facilities, or to confer upon the State any jurisdiction over such Class II gaming conducted by the Tribe.

22.2 Except as set forth in this Compact, nothing shall be deemed to authorize the State or any political subdivision thereof to regulate in any manner the government of the Tribe, including the Board, or to interfere in any manner with the Tribe's selection of its government officers, including members of the Board.

ARTICLE 23. SEVERABILITY

In the event that any section or provision of this Compact is held invalid, or its application to any particular activity held invalid, it is the intent of the parties that the remaining sections of this Compact and the remaining applications of such section or provision shall continue in full force and effect.

ARTICLE 24. NOTICES

Unless otherwise indicated differently, all notices, payments, request, reports, information or demands which either party may desire or be required to give the other party hereto, shall be in writing and shall be personally delivered or sent by telefax or

first class certified or registered United States mail, postage prepaid, return receipt requested, and sent to the other party at its address appearing below or such other address as either party shall hereinafter inform the other party by written notice:

Tribe: Coeur d'Alene Tribe
Attn: Tribal Chairman
Tribal Headquarters
Plummer, ID 83851

State: Office of the Governor
Attn: Governor
Statehouse
Boise, ID 83720

ARTICLE 25. SUCCESSORS

This Compact shall bind and inure to the benefit of the respective successors of the parties.

ARTICLE 26. ENTIRE AGREEMENT

This Compact, including the attached Appendices "A," "B" and "C" which are fully incorporated into this Compact by this reference, constitute the entire agreement between the parties, subject only to the contingencies set out in Article 6. Neither party is relying on any prior or other written or oral representation in entering into this Compact.

ARTICLE 27. MULTIPLE ORIGINALS

This Compact is executed in triplicate. Each of the three (3) Compacts with an original signature of each party shall be an original.

ARTICLE 28. GOVERNING LAW

This Compact is, in all respects, to be governed by the laws of the United States of America, the Tribe or the State, as applicable.

ARTICLE 29. DURATION AND RENEGOTIATION

The State or the Tribe may, by appropriate and lawful means, request negotiations to amend or replace this Compact. In the event of a request for renegotiation, this Compact shall remain in effect until renegotiated or replaced. Such requests shall be in writing and shall be sent by certified mail to the Governor of the State or the Chairman of the Tribe at the appropriate governmental office.

ARTICLE 30. EFFECTIVE DATE

This Compact shall become effective upon signature by both parties, approval by the Secretary and publication of that approval in the Federal Register in accordance with the Act. This Compact is entered pursuant to the Act, State law, and Tribal law.

ERNEST STENSGAR
Chairman
Coeur d'Alene Tribe

12-18-92
Date

CECIL ANDRUS
Governor
State of Idaho

12-11-92
Date

APPENDIX A

COEUR D'ALENE TRIBE/STATE OF IDAHO

CLASS III GAMING COMPACT

SECURITY AND SURVEILLANCE REQUIREMENTS

1. The Board shall ensure that the gaming operation and manager will:

   A. Comply with all relevant laws;

   B. Provide for the physical safety of personnel employed by the gaming operation;

   C. Provide for the physical safety of patrons in the gaming facility;

   D. Provide for the physical safeguarding of assets transported to and from the gaming facility and cashier's cage department; and

   E. Provide for the protection of the patrons and the gaming facility's property from illegal activity.

2. Identification Cards. The Board shall require all gaming employees to wear identification cards issued by the Board which shall include the employee's photograph, first name, employee number, Tribal seal or signature, and a date of expiration.

3. Inspections. The Board shall retain qualified inspectors or agents under the authority of the Board as needed. Said inspectors or agents shall be independent of the gaming operation and shall be supervised and accountable only to the Board.

4. Closed Circuit Television. The Tribe shall ensure that every gaming facility shall have installed, and shall maintain and operate a closed circuit television system according to the specifications set forth in this Appendix. The Commission shall have access to the system or its signal at all times.

5. At all times during the conduct of Class III gaming the following surveillance shall be required in gaming facilities:

   A. Video cameras capable of providing pan, tilt and zoom surveillance of all Class III games open to the public for play;

   B. Domes that completely enclose each video camera required under this paragraph and conceal such camera's actions yet accommodate clear, unobstructed camera views;

   C. At least one employee or a management official monitoring the video surveillance feed on closed circuit video monitors during all hours of Class III gaming; and

   D. Video recording of video surveillance camera feed.

6. Required Surveillance. The Tribe shall ensure that every gaming facility shall conduct and record surveillance which allows clear, unobstructed views of key areas of the gaming facility, including at a minimum:

   A. The surveillance of areas required by paragraph 5 of this Appendix; and

B. All counting rooms, cashier cages and slot cages.

7. Equipment in Commission Surveillance Offices. Gaming facilities shall be equipped with a minimum of two 12-inch monochrome video monitors with control capability of any video source in the surveillance system.

8. Lighting. Adequate lighting shall be present in all areas of the gaming facility to enable clear video reproduction.

9. Surveillance Room. There shall be provided in each gaming facility a room or rooms specifically utilized to monitor and record activities in gaming areas, count room, cashier cages and slot cages, if any. These rooms shall have a trained surveillance person present during facility operation hours.

10. Playback Station. An area is required to be provided within the commission offices that will include, but is not limited to, a video monitor and a video recorder with the capability of producing first-generation videotape copies.

11. Changes in game location. The operator may change the location of games and/or gaming devices. The surveillance system must also be adjusted, if necessary, to provide the coverage required by these rules. The Board shall approve the change in the surveillance system before the relocated games or other gaming devices may be placed into operation. The operator must submit any change to the surveillance system showing the change in the location of games, other gaming devices and related security and surveillance

equipment within seven (7) days in advance of the proposed changes to the Board.

APPENDIX B

COEUR D'ALENE TRIBE/STATE OF IDAHO

CLASS III GAMING

OPERATING REQUIREMENTS

1. Law Enforcement and Security. Each operator shall be required to employ a reasonably adequate security force and shall submit a security plan to the Board for its approval. The operator shall file a written report with the Board detailing any incident in which an employee or patron or other person is suspected of violating a provision of regulations, the Gaming Code, this Compact or applicable laws within twenty-four (24) hours of the occurrence of the incident.

2. Disciplinary Measures. The Board shall implement disciplinary measures upon the finding of a violation of the Gaming Code, regulations, this Compact or applicable laws. The Board shall honor the suspension of an occupational license of any person currently under suspension or in bad standing in any other United States gaming jurisdiction.

3. Prohibition on Attendance of Minors. No person under eighteen (18) years of age shall be allowed in a gaming area of the gaming facility while gaming activities are being conducted, unless Tribal or State liquor regulations require otherwise. No such minors shall be permitted, personally or through an agent, to play or place wagers at or collect winnings from any game.

4. Prohibition on Employment of Minors. No person under the age of eighteen (18) shall be employed as a gaming employee, unless Tribal or State regulations require otherwise.

5. First Aid Facilities. The operator shall be required to equip and maintain reasonably adequate first aid facilities.

6. Firearms Prohibited. The possession of firearms shall be prohibited at all times within the gaming area and adjacent facilities except for security officers on duty and law enforcement officers on duty.

7. Check Cashing and Credit Card Transactions. The Tribe may offer check cashing and credit card transactions, including cash advances, as routinely offered by other businesses in the State. This provision shall not be construed as allowing credit to be offered by the Tribe or the management contractor or any other person or entity other than through a bona fide credit card company.

8. Internal Control System. In addition to compliance with the ordinance, regulations and the provisions of this Compact, the gaming facility shall be operated pursuant to an internal control system approved by the Board. The internal control system shall be designated to reasonably assure that:

   A. Assets are safeguarded;

   B. Financial records are accurate and reliable;

   C. Transactions are performed only in accordance with the management's specific authorization;

D. Access to assets is permitted only in accordance with management's specific authorization;

E. Recorded accountability for assets is compared with actual assets at reasonable intervals and appropriate action is taken with respect to any discrepancies; and

F. Function, duties and responsibilities are appropriately segregated and performed in accordance with sound practices by competent, qualified personnel.

APPENDIX C

COEUR D'ALENE TRIBE/STATE OF IDAHO

CLASS III GAMING COMPACT

ACCOUNTING AND CASH CONTROL

1. Financial Statements. The Board shall require the filing of monthly and annual financial statements covering all of the financial activities of the gaming operation. At a minimum, the financial statements shall be prepared in accordance with generally accepted accounting principles and shall include the following items in detail: all gaming revenues by category of gaming activity; net revenues of complimentary services; total costs and expenses; income before extraordinary items; and net income.

2. Internal Control System. Operators shall implement an internal control system that meets the following minimum standards:

   A. Administrative controls. Administrative controls which include, but are not limited to, the plan of organization and the procedures and records which reflect the decision process leading to management's level of authorization of transactions.

   B. Accounting controls. Accounting controls which include the plan of organization and the procedures and records intended to safeguard assets and ensure the reliability of financial records and are consequently designed to provide reasonable assurance that:

i) Transactions are executed in accordance with management's general and specific authorization.

ii) Transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain accountability for assets.

iii) Access to assets is permitted only in accordance with management authorization.

iv) Recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Personnel control. The internal control system shall ensure that personnel are honest and competent and adequately trained in the applicable procedures. Employee functions shall be segregated to ensure that no employee is in a position to perpetrate or conceal errors or irregularities in the normal course of his or her duties.

CLASS III GAMING CD'A RESOLUTION 22 (93)

WHEREAS, the Coeur D'Alene Tribal Council has been empowered to act for and on behalf of the Coeur D'Alene Tribe pursuant to the Revised Constitution and By-Laws, adopted by the Coeur d'Alene Tribe by referendum November 10, 1984, and approved by the Secretary of the Interior, Bureau of Indian Affairs, December 21, 1984; and

WHEREAS, the Coeur D'Alene Tribe initiated Class III gaming compact negotiations with the State of Idaho on April 15, 1992; and

WHEREAS, the 180 day minimum statutory negotiating period expired October 12, 1992, but the Tribe continued to negotiate at the State's request; and

WHEREAS, because of the impending popular vote on a proposed amendment to the constitution of the State of Idaho (HJR 4) which might adversely impact the Tribe's legal position, the Coeur d'Alene Tribe's attorney was directed to file a declaratory judgment lawsuit in Federal Court against the State of Idaho requesting a declaration of the various rights under Indian Gaming Regulation Act 25 U.S.C. § 2701, et seq., which was filed on November 3, 1992; and

WHEREAS, the State of Idaho has agreed to enter into a partial Class III gaming compact with the Coeur d'Alene Tribe and to resolve disputed issues through a process established in the compact, including a declaratory judgment action;

NOW, THEREFORE, BE IT RESOLVED, the Chairman of the Coeur D'Alene Tribal Council is authorized to sign the Class III Gaming Compact which has been negotiated on behalf of the Coeur d'Alene Tribe with the State of Idaho; and

BE IT FOREVER RESOLVED, that the filing of the declaratory judgment lawsuit against the State of Idaho on November 3, 1992, is formally authorized and approved.

CERTIFICATION

The foregoing resolution was adopted by the Coeur D'Alene Tribal Council at a meeting held at the Joseph R. Garry Administration Building, Tribal Headquarters, on November 12, 1992, with the required quorum present by a vote of 3 FOR 0 AGAINST 1 ABSTAIN

ERNEST L. STENGAR, CHAIRMAN
COEUR D'ALENE TRIBAL CHAIRMAN

MARGARET R. JOSE, SECRETARY
COEUR D'ALENE TRIBAL COUNCIL

AGREEMENT ON

TIMING OF JUDICIAL RESOLUTION

The State of Idaho (hereinafter the "State") and the Coeur d'Alene Tribe (hereinafter the "Tribe") have been negotiating a compact for Class III gaming. The parties have agreed to enter into a partial compact on certain Class III games. However, the parties have been unable to agree upon the types of Class III games permitted by the Indian Gaming Regulatory Act (hereinafter the "Act") to be played by the Tribe and whether other restrictions on scale of operation are allowed under the Act.

The State takes the following positions:

a. Types of Games. Under the applicable laws of the State before and after passage of HJR 4 (1992), the Act permits only state lottery, pari-mutuel betting on racing, and the simulcast thereof as authorized Class III games in Idaho.

b. Restrictions. The Act permits the State to negotiate reasonable restrictions and requirements for the conduct and operation of gaming in furtherance of the public interest, including negotiated limits upon the scale of operations of other Class III games, should they be allowed.

The Tribe takes the following positions:

a. Types of Games. Under either Section 20, Article III, of the Idaho Constitution and the applicable Laws of the State or the amendment to Section 20, Article III, of the Idaho State Constitution by HJR 4, 51st Idaho Leg. Special Session (1992),

AGREEMENT ON

DECLARATORY JUDGMENT ACTIONS

The State of Idaho (hereinafter the "State") and the Coeur d'Alene Tribe (hereinafter the "Tribe") have been negotiating a compact for Class III gaming. The parties have agreed to enter into a partial compact on certain Class III games. However, the parties have been unable to agree upon the types of Class III games permitted by the Indian Gaming Regulatory Act (hereinafter the "Act") to be played by the Tribe and whether other restrictions on scale of operation are allowed under the Act.

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a. Types of Games. Under either Section 20, Article III, of the Idaho Constitution and the applicable Laws of the State or the amendment to Section 20, Article III, of the Idaho State Constitution by HJR 4, 51st Idaho Leg. Special Session (1992),

the Act permits the Tribe to engage in all games that contain the elements of chance and or skill, prize and consideration.

b. Restrictions. The Act prohibits a state from imposing restrictions on the scale of operation of allowable games which reduce either the revenue to the Tribe, or the potential for Tribal economic development. Scale of operation restrictions include state-imposed limits on the number of gaming machines and gaming tables as well as limits on the size of prizes and bets.

Both the Tribe and the State realize that failure to resolve these legal issues precludes a successful resolution of the compact process established by the Act. Therefore, the parties are committed to an expeditious resolution of the legal issues involved. The Tribe filed a declaratory judgment action on November 3, 1992. The State agrees to file a similar declaratory judgment action in federal court within five (5) days of the signing of this agreement and agrees to seek a hearing on the merits of the legal issues. The parties will attempt to integrate, merge or consolidate the declaratory judgment actions, or take such other steps as may be necessary to achieve a review on the merits. The Tribe agrees not to raise a "bad faith" claim under the Act so long as one or both of the cases is proceeding on the merits. By this agreement, neither party waives any defenses and/or rights to appeal or seek a stay or judicial review of any judicial determinations.

DATED this 18th day of December, 1992.

Howard Funke,
Tribal Attorney
Coeur d'Alene Tribe

Larry EchoHawk,
Attorney General of the
State of Idaho

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Both the Tribe and the State realize that failure to resolve these legal issues precludes a successful resolution of the compact process established by the Act. Therefore, the parties are committed to an expeditious resolution of the legal issues involved but do not desire to impact the election process by doing so. The Tribe filed a declaratory judgment action on November 3, 1992. The State will treat this filing as occurring before the election. As a matter of state law, it was filed before the official canvas of votes and declaration of results pursuant to chapter 12, title 34, Idaho Code, and the State will raise no claim or defense which depends upon whether an action is filed before or after the 1992 general election.

DATED this 18th day of December, 1992.

Howard Funke,
Tribal Attorney
Coeur d'Alene Tribe

Larry EchoHawk,
Attorney General of the
State of Idaho

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DATED this 18th day of December, 1992.

Howard Funke,
Tribal Attorney
Coeur d'Alene Tribe

Larry EchoHawk,
Attorney General of the
State of Idaho

Written Testimony of Rick Hill
Chairman of the National Indian Gaming Association
Before the Senate Committee on Indian Affairs
June 9, 1999

Chairman Ben Nighthorse Campbell, Vice Chairman Daniel Inouye, Members of the Senate Committee on Indian Affairs, thank you for inviting me to testify on behalf of the National Indian Gaming Association (NIGA) on this very important issue.

As you may know, NIGA is a non-profit organization established in 1985 by Indian Nations engaged in governmental gaming activities. NIGA membership is composed of 168 sovereign Indian nations and 99 non-voting Associate (corporate) members representing Tribes, organizations, and businesses engaged in tribal gaming enterprises throughout the United States. NIGA was formed by Tribes to protect their sovereign governmental rights and to support their economic interests before Congress and around the country.

Let me begin by stating that Indian Nations and NIGA are very pleased that the Senate Committee on Indian Affairs has elected to examine the issue of Internet gaming and S. 692, the Internet Gambling Prohibition Act. Legislation that addresses the use of the Internet in gaming operations could have collateral consequences for the Native American community. As such, we applaud your taking the initiative to review the issues surrounding Internet gambling.

Internet gaming is a very serious issue for NIGA members. In addition to removing potential opportunities in the future for Indian Nations, S. 692 could also foreclose beneficial activities which are presently authorized under the Indian Gaming Regulatory Act (IGRA).

In addition, this legislation fails to factor in technological advances which, in the future, could result in Indian Nations being denied economic development opportunities enjoyed by

every other governmental entity in the United States. Even the National Gambling Impact Study Commission has acknowledged the positive economic effects of Indian gaming in general, and the use of technology by Tribes in particular. In short, the Internet is merely an extension of these tools for economic development.

We have listed several general concerns Tribal governments have with regard to a broad-based prohibition of Internet gaming, as well as the specific problems we believe S. 692 creates. We also propose a solution for the problems created in the current iteration of S. 692.

Specific Concerns

1) **S. 692 is Overly Broad and Puts Indian Nations at a Competitive Disadvantage**

Although S. 692 is entitled "The Internet Gambling Prohibition Act," it does not establish an absolute prohibition. Instead, it contains numerous carve-outs for favored industries and constituencies. For example, state lotteries, horse racing, and forms of computer-aided gaming similar to those that take place on Indian reservations would be allowed to continue.

Moreover, S. 692 would legalize some forms of computer-assisted betting that are technically *illegal* under current law. For example, the broad exemption given to pari-mutuel wagering activity would essentially make legal on the Internet, types of wagering that are not legal in the physical world. S. 692 as it is currently drafted, implies that the Interstate Horse Racing Act allows for the legal transmission and receipt of interstate pari-mutuel bets or wagers. As the Justice Department noted in Congressional correspondence last year, the Interstate Horse Racing Act does not allow for such gaming activity; if a pari-mutuel wagering business currently transmits or receives interstate bets or wagers (as opposed to intrastate bets or wagers on the

outcome of a race occurring in another state), it is violating federal gambling laws.

In addition, while the Interstate Horse Racing Act permits limited interstate wagering on pari-mutuel horse racing, it is silent on other forms of pari-mutuel wagering, such as dog racing and jai alai. The Internet Gambling *Prohibition* Act would legalize such wagers. Thus, if enacted, S. 692 would actually expand legal wagering over the Internet.

You should also know that under S. 692, some in-home wagering would be allowed, despite the "dire consequences" of such activities that have been predicted by Senator Jon Kyl and other sponsors of the bill.

In short, it appears to us that the intention of S. 692 is to pick winners and losers in the marketplace, favoring industries with large lobbying budgets and powerful political constituencies over Indian Nations and other less influential gaming industry participants.

It is NIGA's position that, in the context of legislation dealing with Internet gaming activity, tribal governments should be offered at least as much protection under the law as state governments and certainly, private, for-profit gaming interests.

2) S. 692 Upsets the Balance Between federal, State and Tribal Authority over Gaming

A broad-based prohibition on the use of technology in Indian gaming imposed at the federal level represents a dramatic change from traditional methods of dealing with gaming. For the most part, the model of cooperation between Tribes and state governments under IGRA has worked, providing tremendous economic opportunities to Indian Nations and entertainment opportunities for consumers. At the very least, when current law is not sufficient to address the use of technology in Indian gaming, we believe issues should be worked out between individual

Indian Nations and the states in which they are located.

We have already seen this take place in one jurisdiction. The compact between the Coeur d'Alene Nation and the State of Idaho explicitly permits the use of interactive technology to enhance gaming opportunities. We question why the federal government should substitute its judgement for that of state and Tribal officials in this context.

3) Current Law Adequately Addresses the Use of Technology in Indian Gaming

We believe that Congress has already spoken on the issue of using technology to assist tribal gaming operations. The Indian Gaming Regulatory Act and the accompanying legislative history to IGRA are crystal clear about the conditions under which new technologies may be used for Tribal gaming operations.

> The Committee intends... that Tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that Tribes should restrict class II games to existing games, sizes, levels of participation, or current technology. The Committee intends that Tribes be given every opportunity to take advantage of modern methods of conducting class II games, and the language regarding technology is designed to provide maximum flexibility.[1]

IGRA struck a delicate balance between states and Tribal gaming operations. That legislation was carefully crafted to ensure that Indian Nations would have the opportunity to engage in gaming activities to further economic development and allow Tribes to achieve a measure of self-sufficiency. S. 692 would upset the balance of IGRA by putting Indian Nations at a competitive disadvantage to other gaming interests, and, therefore, deal an economic blow to Tribes.

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[1] S. Rep. No. 446, 100th Cong., 2d Sess. 9 (1988) (emphasis added)

Currently successful multi-tribal games such as Mega-Bingo would be put at risk by passage of S. 692 in its current form. The Internet Gambling Prohibition Act precludes the use of computer-assisted technology to link interstate gaming operations such as Mega-Bingo. Moreover, intrastate, multi-jurisdictional class II games would only be permitted if tribal-state compacts were in place. In essence, S. 692 imposes a new compact requirement on technologically-assisted class II gaming. We believe specific reference should be made in S. 692 to these and other games as permissible under IGRA without restriction.

The National Gambling Impact Study Commission's draft report addresses this issue:

> Tribes currently operate Class II "megabingos" that... are not Internet gaming, as the linkages are reservation to reservation and do not involve individual home terminal access. Over 60 tribal governments currently use these forms of technology in the play of interstate linked class II bingo games which are satellite broadcast across the country. These forms of technology are used to broaden the participation levels of these games and attract more people to visit Indian communities.

In its final report, the Commission will put forth the following recommendation:

> The Commission recommends that Congress should adopt no law altering the right of Tribes to use existing telephone technology to link bingo games between Indian reservations when such forms of technology are used in conjunction with the playing of Class II bingo games as defined under the Indian Gaming Regulatory Act.

NIGA supports the Commission's recommendation, and urges Congress to include specific relief for Indian Nations in S. 692.

4) Proxy Play

Section 2(F)(2) of the Internet Gambling Prohibition Act attempts to prohibit the use of proxies in any type of technologically-assisted class II gaming in which a computer server is

utilized. This provision directly undermines the National Indian Gaming Commission, which has ruled that proxy play is legal and appropriate.

NIGA believes that proxy play should be allowed to the full extent permitted by the Indian Gaming Regulatory Act. Accordingly, we urge the Committee to delete Section 2(F)(2) and ensure the viability of proxy play.

5) State Law Enforcement on Tribal Lands

The Internet Gambling Prohibition Act would set a dangerous precedent by allowing state authorities jurisdiction over activity that takes place on Tribal Lands.

S. 692, as currently drafted, provides broad authority for state attorneys-general to enforce the terms of a federal prohibition on most forms of Internet wagering. To the credit of the drafters, there is an exception to this broad authority for enforcement on Indian reservations. Section 2(5)(B)(iii) of S. 692 states that the prohibition (and therefore, state enforcement authority) does not apply to:

> information exchanged exclusively between or among 1 or more wagering facilities that are located within a single state and are licensed and regulated by that State, and any support service, wherever located, if the information is used only for the pooling or processing of bets or wagers made by or with the facility or facilities under applicable State law.

Unfortunately, to qualify for the exception, gaming must be "licensed and regulated" by the state. As you know, class II gaming, regardless of whether it is technologically enhanced, does not require a Tribal-state compact, pursuant to the terms of IGRA. Thus, the exception would seem not to apply to class II gaming activity that takes advantage of telecommunications technology.

This oversight highlights the need for this Committee to review and amend any and all gaming legislation that potentially impacts Tribes. Given the complexities of IGRA and the unique relationship Tribes have with federal, state, and local governments, the expertise of the Committee on Indian Affairs is desperately needed.

6) The Internet Provides Extraordinary Economic Opportunities for Rural Tribes

Internet gaming can be a great boon to rural Indian Nations. The Internet represents an opportunity for rural Tribes to reach a global market and generate revenues that had previously been out of the realm of possibility. Many Tribes are not physically located near large enough population centers to sustain land-based gaming operations. The Internet merely provides these Nations with the same opportunities Tribes located close to major cities already enjoy. For these rural Tribes, Internet gaming could be the gateway to economic self-sufficiency and wealth creation.

Equally important, using Internet technology to enhance gaming can also be a gateway to other forms of electronic commerce for Tribes—commerce not centered around gaming. Web sites can generate advertising revenues, technology-related employment, and innovative marketing opportunities. Gaming activity provides the jobs and training resources that can ultimately be applied to other e-commerce activity. In the same way that gaming Tribes are using the capital generated by wagering operations to diversify into other businesses, the Internet provides an avenue for reinvestment of intellectual capital. For tribes to be shut out of this avenue of economic development would be a mistake.

General Concerns With the Approach Taken by S. 692

We recognize that there is a fundamental policy debate surrounding the pervasiveness of gaming in America in general. Like others, we have concerns about the extension of gambling into the home.

Nevertheless, the framework for imposing a semi-prohibition such as the one contained in S. 692 raises serious questions with respect to enforceability and intrusiveness. The following are some of NIGA's concerns about the bill's approach in general.

1) Prohibition of Internet Gaming is Unenforceable

Today, there are a few hundred thousand Internet sites. In ten years, there will be a few hundred *million* sites. There is no functional way for federal and state law enforcement personnel to examine every site on the Internet, now or in the future. In addition, the Internet is an international medium. Regardless of any action undertaken by the U.S. government, the United States will not be able to stop the proliferation of gaming sites in foreign countries.

Australia and sovereign nations in Europe and in the Caribbean already have fully-developed licensing or regulatory regimes that do not and will not exclude customers located in the U.S. By prohibiting tribes from competing with such interests, the Tribal share of the gaming market will erode, and gains made to date could be erased.

In addition, Internet sites are extremely liquid—changing the name and address of a location (and thus, removing it from the authority of a specific Court injunction) takes a matter of seconds. The enforcement scheme in S. 692 relies on already overworked federal and state law enforcement personnel. Moreover, as Senator Dianne Feinstein recently explained, S. 692

"deputizes Internet Service Providers" as federal law enforcement agents.

We are concerned that because application of S. 692 would be difficult (if not impossible) overseas, the vast majority of enforcement authority (both at the ISP level and on the ground) would target Indian Nations, since they are easy to reach. The disproportionate enforcement would likely resemble legislation specifically and solely aimed at Indian Nations.

2) Regulation of Tribal Internet Gaming

From a regulatory perspective, the challenges posed by Internet and other remote gaming activities are nonexistent in the context of tribally-sponsored operations. The fundamental problem with private-sector Internet gaming is that it is difficult to pin down. Addresses change, ownership shifts, and Internet sites move-- not merely from city to city, but often from country to country. The only way to ensure comprehensive regulation is to require a fixed site -- one that can be inspected at will to ensure compliance with all applicable rules and regulations.

In contrast, tribal gaming conducted with the use of Internet technologies does not move. Tribal lands remain the unchanging tie for regulators. Moreover, all tribal gaming is subject to at *least* two levels of regulation: by each tribal gaming commission and by the National Indian Gaming Commission.

From a technical perspective, regulating the actual transaction in the context of Internet wagering can be accomplished in the same manner as regulation of so-called "land-based" casinos. Each transaction leaves an electronic audit trail that can be preserved indefinitely. Software experts can test the integrity of each computer operation, while computer engineers can review the workings of each piece of computer hardware. Moreover, auditors can review all

books and records to ensure that jurisdictional rules are respected, minors are screened out, and appropriate information is reported to taxing authorities. Finally, tribes can mandate other requirements such as links to Gamblers Anonymous, the National Council on Problem Gambling, or other similar sites.

Such a regulatory regime could generate enough revenue to pay for itself without costing taxpayers a dime, while providing a means for Tribal economic development in cyberspace.

Potential Solutions

Because of the issues outlined above, NIGA cannot support S. 692 as currently drafted. There is not sufficient acknowledgment of the current legality of Indian gaming, no workable exemption for existing Indian gaming, and no mechanism to allow Indian Nations to use new technologies such as the Internet for growth and development (as is specifically provided for in IGRA).

NIGA believes the entire effort to prohibit economic development through gaming on the Internet is misguided at best, and could be disastrous at worst. Moreover, such a prohibition is contrary to the first purpose of IGRA:

> To provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments.

This purpose should not be overlooked or limited with the development of new technologies.

We believe many problems can be remedied by adding language similar to the following in section (f)(1) of the bill, which would exempt from the prohibition:

> (C) any otherwise lawful wager for Class II gaming as defined in Section 4

of the Act of October 17, 1988 102 Stat. 2467, conducted by an Indian Tribe on the Tribe's reservation.

While this language would not correct seemingly fatal flaws with respect to enforcement and intrusiveness, it would ensure that the status quo with respect to tribal gaming is maintained.

Indian Nations, like individual states, should be permitted the opportunity to use new technologies for the development of their gaming operations. Tribes, as sovereign governmental entities, should also be afforded an exemption within S. 692 that permits Class II play under tribal oversight and regulation, and for Class III gaming subject to compact. We respectfully request the Committee consider such an amendment in its deliberations over S. 692.

Thank you for inviting NIGA to testify. We are prepared to respond to any questions.

Prepared Remarks of Frank Miller, Esq.

Before the United States Senate
Committee on Indian Affairs

June 9, 1999

Good morning. Chairman Campbell, Vice Chairman Inouye, members of the Committee, my name is Frank Miller. Thank you for this opportunity to testify on the issue of the internet and how it may affect Indian gaming.

This morning, I would like to address three specific issues: (1) tribal gaming and the current use of technology by Native Americans; (2) the Kyl internet gambling bill and its impact on tribal gaming operations; and (3) the broader issue of whether it is possible to regulate technologically-assisted gaming.

Given my previous professional experience, I believe I am particularly well-suited to speak to these issues. Prior to my joining the private sector in 1997, I was the director of the Washington State Gambling Commission, a position I held for six years. Washington State has one of the largest gambling enforcement commissions in the country, trailing only Nevada's and New Jersey's in size. In my capacity as the chief gambling regulator for the state, I was responsible for overseeing charitable, commercial, and class III tribal gaming operations. During my tenure, I also had the privilege of negotiating nineteen (19) tribal-state gaming compacts. In addition, I served as president and board member of the North American Gaming Regulators Association in 1994 and 1995.

Mr. Chairman, I have closely monitored the progress of internet gaming legislation in both the 105th and 106th Congresses. I am very concerned that critical legislative decisions are being made based on inaccurate or incomplete information. I believe sound policy can only be developed by having all of the facts presented to decision-makers in a fair and unbiased way – regardless of whether one is in favor of or opposed to the

application of 21st century technology to an activity such as gaming.

I. Use of Technology in Tribal Gaming

A. Current Law and the Need for Telecommunications In Tribal Gaming

When examining the issue of how technology affects tribal gaming operations, one has to begin with the proposition that most Indian reservations (and, therefore, Indian casinos) are located in areas where customer traffic is relatively light. This causes a circularity problem. Without large numbers of customers coming through the door, tribes cannot offer sizable jackpots – and without sizeable jackpots, it becomes much more difficult to attract and retain customers. For this very reason, a number of state governments have banded together in the Powerball lottery alliance. One of the few ways for Indian gaming to avoid this catch-22 is to allow individual tribes to link specific facets of their wagering operations the way state governments do – in essence, to create multi-tribe games operated for customers from various reservations, all participating in one big game with a much larger pay-out.

When Congress enacted the Indian Gaming Regulatory Act in 1988, it did so knowing that not all tribal casinos would be able to drive economic development, given their remote location. As such, IGRA anticipated that tribes should be able to join forces in order to effectively compete against traditional gaming. It was the intent of the Congress for tribes to be able to utilize the latest technology to provide gaming services to markets that they would otherwise never be able to reach. Accordingly, IGRA authorized Native American gaming enterprises to use telecommunications technology to provide class II gaming products to a broader audience.

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25 U.S.C. sec. 2701 et seq.

> The term 'class II gaming' means . . . the game of chance commonly known as bingo *(whether or not electronic, computer, or other technologic aids are used in connection therewith)* . . . ."

Moreover, as the legislative history accompanying IGRA explains:

> [T]he Committee intends . . . that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II games to existing games, sizes, levels of participation, *or current technology*. The Committee intends that tribes be given every opportunity to take advantage of modern methods of conducting class II games and *the language regarding technology is designed to provide maximum flexibility*. In this regard, *the Committee recognizes that tribes may wish to join other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues*. For example, linking participant players at various reservations in the same or different states, by means of telephone, cable, television, or satellite may be a reasonable approach for tribes to take.

While this august body cannot be faulted for its failure to predict the development of the internet as a means of mass communication, the legislative history of IGRA clearly allows for the use of such technology to consolidate gambling activities among several tribes.

B. Satellite Bingo

Let me give you an example of how this technology is currently being used. Under the technology provision of IGRA, one vendor provides services for tribes to operate class II bingo games in which more than 60 tribes participate. Each of the tribes is linked via satellite and/or telephone lines to a central service location on Indian lands where wagers are pooled together using a computer server. This pooling of bets allows each tribe to provide stakes that could not be offered if the game was restricted only to those customers who

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25 U.S.C. Sec. 2703(7)(A)(i) (1998) (parenthetical in the original)(emphasis added).
S. Rep. No. 446, 100th Cong., 2d Sess. 9 (1988) (emphasis added).

could go to a single location. The increased jackpots make the games more attractive to consumers, and encourage more people to travel to the reservation to play bingo with others who are physically located on different tribal lands. This operation provides over $100 million each year to the tribes that participate in the multi-tribe bingo games, which are then used for local governmental operations and economic development. The additional consumer traffic on the reservations also generates significant revenues for tribes separate from gaming proceeds.

In the example discussed above, all relevant communications travel from one regulated jurisdiction to another, with both ends of the data line being monitored by federal as well as tribal authorities. There are other class II examples which utilize different business models. All, however, are subject to regulation by both tribal authorities and the National Indian Gaming Commission.

As you can see, the technology provision of IGRA has created opportunity for remote tribes where none would otherwise exist. While tribes like the Mashantucket Pequot in Connecticut have the good fortune to be located near large population centers, that is unfortunately the exception rather than the rule. Most tribes are so remote, they cannot generate the minimum customer traffic necessary to support capital investment and offer more attractive games. However, the use of technology allows many tribes to bridge the distance gap, become successful, and compete with other gaming operations.

Indeed, the National Gambling Impact Study Commission has validated this finding. Last week, the Commission noted that linked class II games contribute significantly to the welfare of the tribes, and as such, should be allowed to continue.

> The Commission recommends that Congress should adopt no law altering the right of Tribes to use existing telephone technology to link bingo games between Indian reservations when such forms of technology are used in conjunction with the playing of Class II bingo games as defined under the Indian Gaming Regulatory Act.

C. *The Kyl Bill's Impact on Current Law*

What is particularly disconcerting about the Internet Gambling Prohibition Act (S. 692) sponsored by Senator Jon Kyl (R-AZ), is that this legislation would effectively amend IGRA, eliminate the technology provision, and put an end to almost every type of technologically-assisted gaming that has provided great benefits to tribes. This is because the Kyl gambling bill does not merely address in-home internet gambling; if enacted in its present form, S. 692 would impact all gaming where computer technology is utilized to span geographic distances. Native American enterprises would be prohibited from using any form of telecommunications technology to increase player participation or facilitate the transmission of gambling information on or between tribal lands, even though the use of such technology is specifically authorized by IGRA. As such, it would substantially modify the Indian Gaming Regulatory Act.

II. S. 692 and Tribal Gaming

A. *A Broad Prohibition*

By all appearances, the Internet Gambling Prohibition Act is intended to target offshore operators who provide millions of consumers with casino-style gambling or the opportunity to wager on sporting events using the internet as the primary means of communication. As I said, however, it has been drafted to include other forms of technology besides the internet. Linkages via satellite, dedicated telephone line, dial-up networking, or closed-loop internet-like data transfers would all fall within the scope of the Kyl legislation, since each utilizes computer server technology to manage data traffic.

Besides being overly broad, S. 692 would have a disproportionate impact on tribal operations. Whether by co-mission or omission, the Internet Gambling Prohibition Act would not only supercede IGRA's

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See, Internet Gambling Prohibition Act of 1999, S. 692, sec. 2(b).

The Kyl legislation would prohibit any "person engaged in a gambling business to use the Internet or any other interactive computer service to place, receive or make a bet or wager, or to send receive or invite information assisting in the placing of a bet or wager." S. 692, sec. 2(b)(1)(A),(B). The legislation goes on to define the term "interactive computer service" so broadly as to include nearly all computer related technology. Specifically, the term 'interactive computer service' is defined as: "any information service, system, or access software provider that uses a public communication infrastructure or operates in interstate or foreign commerce to provide or enable access by multiple users to a computer server." S. 692 sec. 2(a)(6). When taken together, these definitions cover telephone, satellite, cable television, internet, intranets, dial-up networks, and most other modern telecommunications methods.

technology provision, it would impose new requirements on tribes that depend on class II gaming for their economic self-sufficiency.

B. ***Imposition of New Requirements for Class II Gaming***

As you know, IGRA sets forth standards and requirements for tribes wishing to offer gaming activities as a means of economic development.

Class II games may be offered by tribes without a tribal-state compact in place. Under the Kyl bill, however, those tribes that wish to offer technologically-assisted class II gaming or merely use data technology to transfer gambling information from one regulated environment to another would be required to have a compact in place or risk prosecution by federal and state law enforcement agencies. This is a radical departure from current law, since it would: (1) mandate that tribes enter into tribal-state compacts for some forms of class II gaming; and (2) authorize state attorneys-general to enforce state gaming laws on tribal lands.

C. ***Subordination of the Tribes to State Governments and the Private Sector***

Equally important for the purposes of this discussion, S. 692 would seem to subordinate the importance of tribal authority to states and in some cases, even treats some private sector gaming operations more favorably.

The Kyl bill would amend the current Wire Act to impose a broadly-worded prohibition of technologically-

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Sec. 2(a)(5)(iii) of the Kyl bill would exempt satellite bingo and other technologically-assisted class II games so long as they are "licensed and regulated by the State." Violations would be enforced by both federal and state officials. Sec. 2(c)(2)(B). However, state officials would not have jurisdiction if the underlying authority to provide gaming services is governed by a tribal-state compact. S. 692, sec. 2(c)(2)(C). Thus, the exemption for satellite bingo and the preservation of tribal sovereignty in the face of state law enforcement jurisdiction only apply when a compact is in place. However, compacts are not required for class II gaming. 18 U.S.C. sec. 1084(d) (1998).

enhanced gambling. In addition to the prohibition, however, S. 692 contains a number of carve-outs for other forms of internet gambling. For example, state lotteries could utilize the internet or other networks to transmit gambling information. Reaffirming current law, horse tracks would be permitted to continue accepting telephone wagers as well as in-home wagers made via cable television equipment. It would even expand the scope of legal in-home gaming by changing current law to allow dog racing and jai alai to be simulcast via the internet and permit consumers to place bets on these contests from their own homes.

At the same time, S. 692 would preclude all class II tribal gaming that utilizes data transmission technology unless a compact is in place. And even that exception to the general prohibition would only apply to gaming that takes place in facilities open to the public. Tribes would be precluded from accepting wagers from the gambler's home.

While I reserve judgment on the propriety of in-home wagering, it is fair to say that Native American gaming enterprises should be given the same opportunities as those sponsored by state governments or private sector businesses. To do otherwise undermines the concept of tribal sovereignty. Since the current version of S. 692 does, in fact, provide greater opportunities for non-tribal gaming (*e.g.*, horse, dog, and jai alai wagering, state lotteries, etc.) than tribal gaming, one has to question its impact on the delicate balance set forth in IGRA.

III. The Policy of Regulation vs. Prohibition

One of the fundamental claims made by the proponents of S. 692 is that interactive gaming is impossible to regulate – and in the absence of regulation, it should be prohibited. With all due candor, that is not exactly accurate. While interactive wagering presents some unique regulatory challenges, the obstacles are by no

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The Interstate Horse Racing Act presently permits the racing industry to accept bets and wagers from remote locations, including individual homes, so long as such wagering is permitted under state law.

In this respect, S. 692 is legislation that actually *increases* in-home wagering activity for some select industries. It is my understanding that if enacted, the Internet Gambling Prohibition Act would legitimize activities that are at present *illegal* under the Wire Act.

means insurmountable.

With respect to the regulation of remote gaming offered by tribes and the question of integrity of regulation, we already have a solid analogy for comparison. In New York and Pennsylvania, account-based telephone wagering on horse races has been permitted for nearly a quarter-century. Moreover, since 1993, the Commonwealth of Pennsylvania has permitted the acceptance of telephone wagers from out-of-state customers. Thus, someone living in Hawaii could have picked up the telephone on Saturday and placed a bet on *Charismatic* to win the Belmont Stakes. Both Pennsylvania and New York, which profit from remote and interactive wagering activity, also regulate the telephone betting operations without significant opposition or incident. There is no reason why the same dynamic cannot apply to tribal gaming.

The use of new technology to provide alternative forms of remote wagering has little impact on "regulatability." So long as there is a physical location and hardware that can be inspected by tribal gaming regulators, the National Indian Gaming Commission, or any other regulatory body, integrity and consumer protection can be accomplished. In short, the regulation of tribally operated interactive or internet gaming can be done in the exact same manner that land-based gaming is regulated.

Mr. Chairman, if you will, I would like to address the broader policy of banning internet gaming for just a moment. As I said earlier, I reserve judgement on in-home wagering. However, given the fact that in-home wagering would continue, and *actually expand* under the Kyl bill (in-home wagers on horse and dog races

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For the purposes of this discussion, "remote gaming" means any type of activity where the bettor is separated by geographic distances from the operator. Such remote gaming does pose some regulatory challenges. For example, it can be difficult to identify the gambler and determine whether he/she is of the requisite age to gamble, when there is no face-to-face interaction between the two parties. These problems are being solved as we speak. A subsidiary of Bally Entertainment (Alliance Gaming) is now actively marketing an interactive gaming platform that requires an initial face-to-face encounter, password protection, hardware integration, and telephone tracing to determine who is accessing the system and from what jurisdiction.

In fact, *Charismatic* lost to *Lemon Drop Kid*.

and other pari-mutuel games would be permitted), the question is whether it is sound policy to ban other types of gaming.

As I understand how the internet operates, its framework makes prohibitions difficult – if not impossible – to enforce. Even the National Gambling Impact Study Commission has noted that the Kyl bill would be ineffective in keeping Americans from searching out and accessing gaming sites online. If that is the case, it seems to me that the better, albeit more difficult, approach is to regulate such activity.

Last year, I traveled to Australia where I met with gaming regulators who recently finalized a comprehensive regulatory program for internet gambling. The model allows for strict regulation, strong consumer protections, and taxation by individual states.

While the Australian model appears viable, I believe even stronger measures can and should be taken in the United States in order to screen out compulsive gamblers and minors from the system, guarantee the collection of taxes from bettors and operators, and ensure that games offered are well-regulated and fair.

If, however, a prohibition is enacted, it will only drive gaming operators off-shore, where enforcement of age-restrictions and other regulations are far less likely to be in place, and are virtually impossible for U.S. authorities to enforce (especially when sovereign governments have already set their own gaming standards, which in some cases, are more relaxed than U.S. regulation). As such, passage of Senator Kyl's Internet Gambling Prohibition Act may have the unintended effect of actually increasing the exposure of children and compulsive gamblers to on-line wagering, while creating a black market that benefits off-shore companies at the expense of the domestic industry, Native American enterprises, and the U.S. economy.

Ideally, a regulatory framework in the United States would be a partnership between the states, Native American tribes, and the federal government, and would be paid for with industry profits. Regulation would

have to include strict licensing requirements, permanent U.S. siting requirements to ensure a jurisdictional nexus and U.S. control, appropriate state, tribal and federal limitations, inspection of hardware and software, and complete accountability through advanced auditing technology. Consumer protection would be achieved and taxes would be collected. To address minor access, gaming operators could be required to strictly control participation through a comprehensive verification system that includes a mandatory waiting period to establish the bettor's identity. Such a regulatory regime would be funded entirely by the operators and would not cost taxpayers a dime.

Technology currently exists to extensively and thoroughly audit on-line casino style games. Auditors would be able to make unannounced "inspections" of virtual games electronically, without the casino ever knowing. From a regulator's perspective, such spot checks are invaluable in the fight against corruption. As one Australian regulator told me last year, "Virtual gaming will be *easier* to regulate than the gaming which exists today." I could not agree more.

Given the reach of the internet, and its international character, I believe a comprehensive regulatory program is a necessity. The passage of the Kyl bill to prohibit some forms of internet gaming, will only serve to create a domestic black market – a market that may be beyond the reach of American legislators and regulators, but not the vulnerable public. If S. 692 is adopted, the end result will be a statute that is impossible to enforce, and ineffective in preventing Americans from accessing gaming sites.

IV. Conclusion

Mr. Chairman, Native American gaming enterprises have been utilizing technology to enhance their products for years, with few – if any – problems in terms of regulation. As technology continues to develop, the internet and other forms of data transfer may be further harnessed for the benefit of the tribes, and the nation as a whole.

However, S. 692 poses a threat to tribes. The collateral impact of the Kyl bill would end the use of technology by gaming tribes, effectively amend IGRA, and extend state jurisdiction onto tribal lands. These consequences should clearly demonstrate that policies regarding tribal gaming are best handled by experts in the field – you and the members and staff of this Committee.

Finally, one has to question the broader policies that the Kyl bill attempts to advance. Regardless of whether one favors or abhors gambling, the internet is a vehicle for personal choice. If it cannot be stopped, the government has the responsibility to ensure that consumers are protected. Maybe that requires regulation, maybe it is merely *caveat emptor* or "let the buyer beware." But to merely declare a partial – yet unenforceable – prohibition does a disservice to the general public.

Chairman Campbell, that is the extent of my prepared remarks. I would be happy to answer any questions that you or other members of the Committee may have.

Statement of

JEFFREY PASH

EXECUTIVE VICE PRESIDENT
NATIONAL FOOTBALL LEAGUE

before the

Subcommittee on Technology, Terrorism
and Government Information
Senate Committee on the Judiciary

March 23, 1999

Mr. Chairman and members of the Subcommittee. My name is Jeffrey Pash. I am the Executive Vice-President and General Counsel of the National Football League. I testified before you in 1997 in support of your prior bill on this matter and am again pleased to appear before you today to express the NFL's strong support for the Internet Gambling Prohibition Act of 1999. We strongly support this bill because it would strengthen and extend existing prohibitions on Internet gambling, including gambling on sports events, and provide enhanced enforcement tools tailored to the unique issues presented by Internet gambling. We join the State Attorneys General who testified earlier and other sports organizations in urging adoption of this important legislation.

The NFL's policy on these issues has been consistent for decades. Simply put, gambling and sports do not mix. Sports gambling threatens the integrity of our games and all the values our games represent—especially to young people. For this reason, the NFL has established strict policies relative to gambling in general and sports betting in particular. The League prohibits NFL club owners, coaches, players and anyone else connected with the NFL from gambling on

NFL games or associating in any way with persons involved in gambling. Anyone who does so faces severe disciplinary action by the Commissioner, including lifetime suspension. We have posted our anti-gambling rules in every stadium locker room and have shared those rules with every player and every other individual associated with the NFL.

The League has also sought to limit references to sports betting or gambling that in any way are connected to our games. For example, we have informed the major television networks that we regard sports gambling commercials and the dissemination of wagering information as inappropriate and unacceptable during football game telecasts. NFL teams may not accept advertising from gambling establishments.

Commissioner Tagliabue reemphasized this January that gambling and participation in the NFL are incompatible. In a memorandum to all NFL clubs, the Commissioner confirmed that no NFL club owner, officer or employee may own any interest in any gambling casino, whether or not the casino operates a "sports book" or otherwise accepts wagering on sports. The Commissioner specifically stated that no club owner, officer or employee "may own, directly or indirectly, or operate any 'on-line,' computer-based, telephone, or Internet gambling service, whether or not such a service accepts wagering on sports." (Ex. A).

The League also has been an active proponent of federal efforts to combat sports gambling. We strongly supported the passage of the Professional and Amateur Sports Protection Act of 1992 (28 U.S.C. 3701 *et seq.*). This 1992 legislation, known as PASPA, halted the spread of sports gambling by prohibiting states from enacting new legislation legalizing sports betting. The League also worked to promote the passage of the Chairman's Internet gambling legislation in the last Congress. Like PASPA, the proposed legislation is a logical and appropriate extension of existing Federal law and policy. The precedents for federal action in this area were

well canvassed by the full Judiciary Committee in its report accompanying the 1992 legislation (S. Rep. No. 248, 102d Cong., 1st Sess. 5-8 (1991)).

The Internet Gambling Prohibition Act of 1999 is a necessary and appropriate federal response to a growing problem that, as the State Attorneys General have testified, no single state can adequately address on an individual basis. Ten years ago, a bookmaker might have used the telephone to call his customers. Today, he simply logs on. Gambling businesses around the country—and around the world—have turned to the Internet in an obvious attempt to circumvent the existing prohibitions on gambling contained in Title 28 and PASPA. Many offshore gambling businesses provide betting opportunities over the Internet, in a clear effort to avoid or complicate effective federal and state law enforcement.

The bill is needed because it strengthens existing law to facilitate the enforcement of gambling prohibitions in the face of new technology. In its report accompanying the PASPA legislation eight years ago, the Judiciary Committee noted the growth of "new technologies" facilitating gambling, including the use of automatic teller machines to sell lottery tickets, and proposals to allow "video gambling" at home. S. Rep. No. 248, *supra*, at 5. It was, in significant part, the specter of expanded gambling raised by those "new technologies" that spurred Congress to enact PASPA. In those days, the "new technologies" did not yet include the Internet. But now the Internet *is* a significant source of gambling activity, and it is appropriate for Congress – as it has done in the past – to ensure that law keeps pace with technology.

The problem of Internet gambling is significant—and growing. According to recent publications, the Justice Department has estimated that Internet gambling generated $600 million in revenue in 1997 alone. (Ex. B). Recent estimates of future gambling activity on the Internet range from $2.3 billion to $10 billion within the next two years. (Exs. C, D).

Internet gambling is successful both because it is currently uncontrolled and because so little effort is required to participate. Unlike traditional casinos, which require gamblers to travel to the casino and place their bets on-site, Internet gambling allows bettors access to on-line wagering facilities twenty-four hours per day, seven days a week. Gamblers can avoid the difficulty and expense of traveling to a casino, which in many parts of the country requires out-of-state travel. Internet gamblers also can avoid the stigma that may be attached to gambling in public on a regular basis. Indeed, Internet gambling threatens to erode the stigma of gambling generally, including sports gambling.

Internet gambling sites are easily accessible and offer a wide range of gambling opportunities from all over the world. Any personal computer can be turned into an unregulated casino where Americans can lose their life savings with the mere click of a mouse. Many of these gambling web sites have been designed to resemble video games, and therefore are especially attractive to children. But gambling—even on the Internet—is *not* a game. Studies have shown that sports betting is a growing problem for high school and college students, who develop serious addictions to other forms of gambling as a result of being introduced to "harmless" sports wagering. Recent sports betting and point-shaving scandals on college campuses from Arizona State to Northwestern University to Boston College provide further evidence of the vulnerability of young people to the temptations of gambling. They also demonstrate how sports gambling breeds corruption and undermines the values of teamwork, preparation and sportsmanship that our game represents.

As the Internet reaches more and more college students and schoolchildren, the rate of Internet gambling among young people is certain to rise. Because no one currently stands between Internet casinos and their gamblers to check identification, our children will have the

ability to gamble on the family computer after school, or even in the schools themselves. And we must not be lulled by the paper tiger set up by proponents of Internet gambling—that children cannot access gambling web sites because they lack credit cards. It does not take much effort for a child to "borrow" one of his or her parents' credit cards for the few minutes necessary to copy down the credit card number and use it to gain access to an Internet gambling service.

The problems connected with Internet gambling transcend the NFL's concerns about protecting the integrity of professional sports and the values they represent. According to experts on compulsive or addictive gambling, access to Internet sports wagering dramatically increases the risk that people will become active, pathological gamblers. The National Council on Problem Gambling has reported that sports betting is among the most popular forms of gambling for compulsive gamblers in the United States. That means that once individuals become exposed to sports betting, they may develop a real problem with recurrent and uncontrollable gambling.

Conducting a gambling business using the Internet is illegal under the Wire Act (18 U.S.C. § 1084) and indeed has been prosecuted—for example, in the case brought against numerous Internet sports betting companies last March by federal authorities in the Southern District of New York (Ex. E). But as the prosecutors in that case plainly recognized, asserting jurisdiction over offshore gambling businesses that use the Internet can be problematic. More significantly, the Wire Act does not include direct mechanisms for ensuring termination by Internet service providers of access to online gambling sites.

Just as Congress enacted the Wire Act to prohibit the use of the telephone as an instrument of gambling, so Congress should now enact specific legislation to prohibit the use of the Internet as an instrument of gambling. And just as the Wire Act provides a mechanism for

bringing about the termination by telephone companies of service to gambling businesses, so the Internet Gambling Prohibition Act of 1999, through its injunctive relief provisions, would provide an effective mechanism for bringing about the termination by Internet service providers of access to gambling sites. In our view, Mr. Chairman, providing such a mechanism for ensuring that Internet service providers will terminate access to such sites is critical to any legislation to combat Internet gambling.

In supporting the PASPA legislation to prevent the spread of legalized sports betting, Commissioner Tagliabue testified:

> Sports gambling threatens the character of team sports. Our games embody the very finest traditions and values. They stand for clean, healthy competition. They stand for teamwork. And they stand for success through preparation and honest effort. With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. The spread of legalized sports gambling would change forever—and for the worse—what our games stand for and the way they are perceived. *Quoted in* S. Rep. No. 248, *supra*, at 4.

Left unchecked, Internet gambling *amounts* to legalized gambling. Its effects on the integrity of professional and amateur sports and the values they represent are just as pernicious. Just as Congress intervened to stem the spread of legalized sports gambling in 1992, so it must intervene to stem the spread of Internet gambling today.

Mr. Chairman, we applaud your efforts and the efforts of your staff to address this important problem. The Internet Gambling Prohibition Act of 1999 will strengthen the tools available to federal and state law enforcement authorities to prevent the spread of Internet gambling into every home, office and schoolhouse in this country, and will send the vital message—to children and adults alike—that gambling on the Internet is wrong. We strongly support the passage of your bill.

Thank you.

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June 8, 1999

The Honorable Ben Nighthorse Campbell
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The Honorable Daniel Inouye
Ranking Minority Member
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Dear Chairman Campbell and Ranking Member Inouye:

In preparation for your Committee's consideration on June 9, 1999 of the impact of Internet gambling legislation on Indian affairs, we urge you to consider the views of the National Football League (NFL) as presented in the attached testimony by Jeff Pash, Vice President of the NFL before the Senate Judiciary Committee, in which the NFL, along with the NCAA, established why Congress needs to address the growing and serious problem of Internet gambling.

The NFL, along with the other major professional and amateur sports leagues, have witnessed dramatic growth in the use of the Internet to conduct sports and other illegal gambling over the past few years. For that reason the NFL, the NCAA, the NBA, the NHL, Major League Baseball, and Major League Soccer all support passage of legislation that would prohibit gambling on the Internet in all parts of the United States. These sports leagues, along with the National Association of Attorneys General and other groups, have urged the Senate to adopt S. 692, sponsored by Senators Kyl and Feinstein, because this bill provides a carefully balanced and workable approach to the problem of Internet gambling. A national solution is needed. The ability of the Internet to transgress time and distance instantaneously mandates that to be effective, a prohibition on Internet gambling must apply to all lands within the nation, including Indian lands. Any exception to this general prohibition would eviscerate the prohibition and represent a hollow answer to this serious issue.

We appreciate the opportunity to submit our views for your consideration. We would be available to answer any questions that you or your staff or other Members may have on this important matter.

Sincerely,

Gerard J. Waldron

Gerard J. Waldron
Counsel to the NFL

cc: Members of the Committee